80-323

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

No.

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

OPINION OF THE COURT OF APPEALS SOUGHT TO BE REVIEWED

REPORTED AT 620 F.2d 930 (2d Cir. 1980)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

No. 120, Docket 75-7600

Argued Nov. 20, 1979

Decided April 3, 1980

Alan J. Hruska, New York City (Roger H. Cummings, John N. Mayberry, Cravath, Swaine & Moore, and John D. Appel, Deputy Gen. Counsel, CBS Inc., New York City, on the brief), for plaintiff-appellant.

Jay H. Topkis, New York City (Bernard Korman, Herman Finkelstein, Allan Blumstein, Max Gitter, Richard Reimer, Fred Heather, Andrew Peck and Paul, Weiss, Rifkind, Wharton & Garrison, New York City, on the brief), for defendant-appellee ASCAP.

Robert J. Sisk, New York City (George A. Davidson, Norman C. Kleinberg, Conley E. Brian, Jr., Michael E. Salzman, and Hughes, Hubbard & Reed, New York City, on the brief), for defendant-appellee BMI, Inc.

David R. Hyde, New York City (Cahill, Gordon & Reindel, New York City, on the brief), for NBC, Inc. as amicus curiae.

Ira M. Millstein, New York City (Weil, Gotshal & Manges, New York City, on the brief), for All Industry Television Station Music License Committee as amicus curiae.

Robert H. Bork, New Haven, Conn., for Aaron Copland, et al., as amici curiae.

Robert M. Lichtman, Washington, D.C. (Philip Elman, Jerry D. Anker, and Wald, Harkrader & Ross, Washington, D.C., Denis Defreitas, Legal Advisor, The Performing Right Society, Ltd., London, England, and Jean-Loup Tournier, Directeur Gen., Societe Des Auteurs, Compositeurs et Editeurs de Musique, Paris, France, on the brief), for The Performing Right Society, Ltd. and Societe des Auteurs, Compositeurs et Editeurs de Musique as amici curiae.

Barry Grossman, Washington, D.C. (John H. Shenefield, Asst. Atty. Gen., John J. Powers, III, Andrea Limmer, Washington, D.C., on the brief), for The United States as amicus curiae.

Hawkins, Delafield & Wood, New York City (Philip R. Forlenza and Rafael Pastor, New York City), submitted a brief for ABC, Inc., as amicus curiae.

Before LUMBARD, MOORE AND NEWMAN, Circuit Judges:

NEWMAN, Circuit Judge:

This is the fourth round of litigation in a lawsuit brought by Columbia Broadcasting System, Inc. (CBS) against the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and their members and affiliates. The lawsuit seeks injunctive relief to prevent ASCAP and BMI from using a blanket license to convey to television networks non-dramatic

performing rights, that is, the right to "perform" copyrighted music by transmitting it to the networks' television audiences. The blanket license permits the licensee to use any music in the repertory of the licensor, as often as desired, for a one-time license fee. The license lasts for a stated term, usually but not necessarily one year. Payment is set at either a flat sum or a percentage of the network's revenue. Alternatively to barring use of the blanket license, the CBS suit seeks modification to require that ASCAP and BMI charge predetermined amounts for each time copyrighted music is used on the air. The blanket license in its present form is alleged to be an agreement unreasonably restraining trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

The lawsuit was filed in 1969. Round one was an eight-week bench trial in 1973 in the District Court for the Southern District of New York (Morris Lasker, Judge). In a comprehensive opinion, replete with detailed findings, Judge Lasker found that CBS had failed to prove its allegations and ordered the complaint dismissed.[1] *Columbia Broadcasting System, Inc. v. American Society of Composers*, 400 F.Supp. 737 (S.D.N.Y. 1975). Round two was the prior appeal to this Court. In an opinion by Judge Gurfein, the Court ruled that the blanket license was an illegal price-fixing device, a *per se* violation of § 1. The matter was remanded to the District Court for formulation of an appropriate remedy. *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and*

[1] That dismissal left pending a severed counterclaim of the defendants, alleging antitrust violations on the part of CBS. The dismissal of the complaint, disposing of less than all the claims, would ordinarily not result in an appealable final judgment in the absence of a certification pursuant to Fed.R.Civ.P. 54(b); however, the dismissal is appealable under 28 U.S.C. § 1292(a)(1) because it is an order denying an injunction.

Publishers, 562 F.2d 130 (2d Cir. 1977). Judge Moore disagreed with the conclusion that the blanket license was price-fixing, but concurred in the decision to remand so that a "practical method" of "per use licensing" might be developed. *Id.* at 141. Round three occurred when the Supreme Court reviewed the decision of this Court. Writing for an eight-member majority, Justice White concluded that the blanket license was not a *per se* violation of § 1 and remanded the case to this Court for further proceedings, including an assessment of the blanket license under the rule of reason. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979). Justice Stevens dissented, agreeing with the majority that the blanket license was not a *per se* violation of § 1 but concluding that the record and certain of Judge Lasker's findings established a § 1 violation under the rule of reason. *Id.* at 25, 99 S.Ct. at 1565.

The matter is now before a panel of this Court that includes only Judge Moore from the prior panel.[2] Additional briefs have been submitted in response to the Court's framing of specific issues, 607 F.2d 543, and extensive oral argument was heard.[3] We now affirm the decision of the District Court.

Facts

The three prior opinions, especially Judge Lasker's, have so fully set forth the facts that only the bare essentials need be again recounted. ASCAP has a

[2] Judge Lumbard was assigned to the panel after the death of Judge Anderson; Judge Newman was assigned to the panel after the death of Judge Gurfein.

[3] The oral argument was held before Judge Newman was assigned to the panel, but he has had the benefit of a complete 234-page transcript of that argument.

membership of approximately 6,000 music publishing companies and 16,000 composers. BMI, a non-profit corporation, is affiliated with approximately 6,000 music publishing companies and 20,000 composers. Composers of virtually all music copyrighted in the United States have granted to either ASCAP or BMI the non-exclusive right to license users to perform their compositions. The repertory of ASCAP has more than three million compositions, and the repertory of BMI has more than one million compositions. CBS and the other two major television networks, NBC and ABC, have held blanket licenses from both ASCAP and BMI for many years. CBS first obtained its blanket license from ASCAP in 1946. At that time ASCAP held exclusive rights to the music of its members, and the blanket license it offered to broadcasters was the only device whereby they could obtain performing rights to copyrighted music.

As a matter of legal entitlement, licensing arrangements were significantly changed in 1950 when a consent decree, first entered in 1941 to settle Government litigation against ASCAP,[4] was reopened and substantially modified.[5] The amended consent decree permits ASCAP to obtain only non-exclusive rights from its member-composers and enjoins ASCAP from limiting, restricting, or interfering with the right of any member to issue directly to any user a non-exclusive license for performing rights. The composers thus retain the legal right to bypass ASCAP and license performing rights directly to CBS. The amended decree also requires ASCAP to offer to any broadcaster either the blanket license, or, as an alterna-

[4] *United States v. ASCAP*, 1940-1943 Trade Cas.¶56,104 (S.D.N.Y. 1941).

[5] *United States v. ASCAP*, 1950-1951 Trade Cas. ¶62,595 (S.D.N.Y. 1950).

tive, a per program license. Both types of licenses permit the user to perform any music in the ASCAP repertory; for the per program license the user pays only with respect to programs on which copyrighted music is performed, whereas, with the blanket license, the user pays a one-time fee for the duration of the license. The decree also provides that in the event of disputes concerning the amount of license fees, the District Court for the Southern District of New York is authorized to determine a reasonable fee.

Similar, though not identical provisions govern the licensing of performing rights by BMI. For purposes of this litigation, the significant fact, stipulated to by the parties, is that CBS could obtain non-exclusive licenses for performing rights directly from copyright owners affiliated with BMI with the same ease or difficultly as it could obtain such rights from copyright owners who are members of ASCAP.

As a matter of factual occurrence, CBS has never made any attempt to obtain performing rights directly from a copyright owner.

Beyond these facts concerning licensing arrangements and opportunities, some understanding is required of the facts concerning CBS's use of music. Two types of classification are involved: one concerns the function of the music, and the second concerns the circumstances under which the selection of music is made. CBS, like all broadcasters, uses music as theme, background, or feature. Theme music is played at the start or conclusion of a program and serves to enhance the identification of the program. Background music accompanies some of the action on the screen. Feature music is a principal focus of

audience attention, such as a popular song sung on a variety show.

Music on network television is selected in one of three ways. Most of it, as much as 90%, is selected by production companies, or "packagers," which produce television programs and sell them to the networks. The music on these programs is almost always theme and background music, much of it composed specially for the production company. Typically the company employs a composer to write theme and background music, acquires the copyright from him, and assigns it to its own music publishing subsidiary. Such music is called "inside" music. In some instances the packager decides to use music that has already been composed, so-called "outside" music. In these instances the packager must acquire from the copyright owner the right to record the music on the soundtrack of the program's film or tape. This right is known as a "synch" right, the music often being carefully fitted to synchronize with the action on the screen. Acquisition of the synch right, however, does not carry with it the separate right to perform the music on the air. That performing right could be acquired by the packager when he acquires the synch right, and reassigned to the network; however, the industry practice has been that the network automatically acquires the performing right for all music used on packaged programs under the network's blanket license for the performing rights to all ASCAP music, and the packager therefore has no need to acquire a performing right for reassignment to the network.

A small portion of network music is selected by the network itself, in those few instances when the network is producing its own programs. A still smaller portion is

selected by the person or group performing the music, in those very few instances where music is spontaneously used. Examples are a football half-time show or a late night talk show on which a guest sings an unscheduled song.

Discussion

Our starting point for determining whether the blanket license violates § 1 is the decision of the Supreme Court remanding the case to us. That decision obliges us to make "an assessment under the rule of reason of the blanket license as employed in the television industry." 441 U.S. at 24-25, 99 S.Ct. at 1565. Since the parties are agreed that the relevant market is the licensing of performing rights to the television networks, we assume our consideration should be similarly confined to the blanket license as employed by the television networks.[6] A rule of reason analysis requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). In this case, however, we are met with the threshold contention of the defendants that the balancing of pro- and anti-competitive effects need not be undertaken because Judge Lasker's findings of fact demonstrate that the blanket license has no anticompetitive effect at all.

[6] The distinction may have significance, since the lawfulness of the blanket license has also been challenged by non-network broadcasters.

Before examining that contention, we must consider whether it is open to us under the Supreme Court's remand. It is possible to read the penultimate paragraph of Justice White's opinion—the one directing us to make a rule of reason assessment—as if the Supreme Court had concluded that the blanket license is a restraint of trade and was requesting further consideration only as to whether its restraining effect was unreasonable, *i. e.*, not outweighed by pro-competitive advantages. Our reading of the entire opinion, however, persuades us that no such initial conclusion was reached. In the first place, the safer course is to read judicial opinions as deciding only what they purport to decide. That may not always be only the narrow holding, for courts, especially appellate courts, have an entirely legitimate function of elucidating principles of law, fairly raised by litigation, even if the resulting pronouncements are not absolutely required for the precise decision reached. Appellate guidance is not valueless because it is dictum. But appellate courts, endeavoring to rule beyond the precise holding of a case, normally make that intention unmistakably clear. In this instance, the Supreme Court's opinion purports to decide only whether the blanket license is a *per se* violation of § 1, that is, a practice with such a high likelihood of having unjustifiable anti-competitive effects that it is condemned under the antitrust laws without the need to assess its effect in a particular case. See *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Once the Supreme Court decided that the blanket license is not a *per se* violation of § 1, we believe it made no decision concerning the effect of the license in the network television industry at issue in this case, thereby leaving open the question of whether the license has any

anti-competitive effect at all. Secondly, Justice White's opinion contains a specific observation that strongly supports our view of the decision's reach. The opinion declares that the majority is "uncertain whether the practice on its face has the effect . . . of restraining competition among the individual composers." 441 U.S. at 13, 99 S.Ct. at 1559. That observation leaves for consideration whether the practice could have a restraining effect as applied to the particular circumstances prevailing in the industry. To that possibility we now turn, but in doing so, we examine the record and Judge Lasker's findings to see whether the blanket license, on its face and as applied, is a restraint at all.

There can be no dispute with the observation of Justice Stevens, in his dissenting opinion, that "there is no price competition between separate musical compositions." 441 U.S. at 32, 99 S.Ct. at 1568-69. The blanket license is the only device by which performing rights are licensed to the networks, and, under a blanket license, no selector of music to be performed on a network considers what the price of using one song would be compared to the price of using any other song. No price considerations affect the choice among songs because the network holds a blanket license to perform all songs.

The absence of price competition among songs, however, does not mean that the blanket license is a restraint upon any potential competition. For price competition to exist there must be at least one buyer interested in purchasing a product from two or more sellers. In this case, there is no evidence that CBS has ever attempted to purchase performing rights to any song from the copyright owners, either the composers or the music publishing

companies to which they may have assigned their copyrights. If the opportunity to purchase performing rights to individual songs is fully available, then it is customer preference for the blanket license, and not the license itself, that causes the lack of price competition among songs. Of course, even customer preferences cannot save some practices from illegality under the antitrust law. If competing sellers fix the prices of their products, they violate § 1 no matter how much a buyer may prefer accepting their fixed price to negotiating with each for a lower price. But a practice that is not a *per se* violation, and this blanket license has authoritatively been found not to be such, does not restrain trade when the complaining customer elects to use it in preference to realistically available marketing alternatives.

Trade is restrained, frequently in an unreasonable manner, when rights to use individual copyrights or patents may be obtained only by payment for a pool of such rights, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948) (copyrighted motion pictures); *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888 (S.D.N.Y.1948) (copyrighted music); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (patents), but the opportunity to acquire a pool of rights does not restrain.

Trade an alternative opportunity to acquire individual rights is fully available. *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950) (patents); *Standard Oil Co. v. United States*, 283 U.S. 163, 51 S.Ct. 429, 75 L.Ed. 999 (1931) (same).

CBS challenges this approach on the ground that some alternatives can always be imagined that would satisfy

the market needs of an antitrust plaintiff. As CBS argues, the blanket license cannot possibly be saved from illegality under § 1 simply because CBS has the alternative of hiring composers to fill its needs for music. CBS is right. An antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition. But in this case the defendants do not suggest that CBS should do anything more extraordinary than offer to buy from competing sellers. We agree with the defendants that if that opportunity is fully available, and if copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade.

In fact, if there is a realistic opportunity to obtain performance rights from individual copyright holders, then the remedy CBS seeks in this case—modification of the blanket license into an option to use all songs plus a charge for each use of any one song—would be a clear instance of unjustified price-fixing in violation of § 1. If ASCAP were to make a per use charge for each song, it would have to determine a price to be charged. Whether or not that price varied for each song,[7] the determination of any price for use of a song by a membership organization of competing songwriters would be classic price-fixing. See 441 U.S. at 17 n. 27, 99 S.Ct. at 1561 n. 27. If

[7] Not the least of the ironies of the CBS claim is that the per use charge it finds acceptable is simply the formula now used by ASCAP to distribute royalties among its members. That formula, based on type of music and frequency of use, does not value any song differently than any other. Thus, if ASCAP were to base charges to CBS on the ASCAP royalty formula, CBS would obtain no price competition whatsoever. Neither CBS nor the packagers would be able to shop competitively for cheaper songs when selecting music.

licensing directly from individual copyright owners were not feasible, then it would be arguable that per use pricing by ASCAP might be that rare instance when price-fixing does not necessarily violate § 1. But CBS's proposed remedy cannot possibly avoid the strictures of § 1 if direct licensing is feasible. We therefore turn to an examination of the feasibility of direct licensing.

It could be argued that the best evidence against the feasibility of direct licensing is the fact that CBS has brought this lawsuit at great expense to avoid taking the blanket license. That surely suggests that the blanket license is not something for which CBS has a preference. But that argument ignores the principle that "the purpose of the Sherman Act is to protect competition, not competitors." *Checker Motors Corp. v. Chrysler Corp.*, 283 F.Supp. 876, 885 (S.D.N.Y.1968) (Mansfield, J.), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969). If the market for selling performing rights to the television networks would be competitive among copyright owners whenever any network chose to deal with them, the antitrust laws are satisfied even though one network has reasons of its own for foregoing that competitive market in preference to the blanket license. The defendants suggest that CBS's preference for the blanket license derives from its unwillingness to seek competitive prices from individual copyright owners while its network competitors enjoy the advantages of obtaining their performing rights under their blanket licenses. In defendants' view, CBS is bringing this lawsuit, not because competition among songwriters has been restrained, but because CBS wants protection from the prospect of its competitors' continuing with blanket licenses. We need not determine whether defen-

dants' speculation is correct, but we agree that the issue is whether competition among copyright owners is realistically feasible, regardless of whether CBS may have some business reason of its own for preferring not to enter an available competitive market.

The entire trial in the District Court concerned primarily the issue of whether direct licensing was feasible. Judge Lasker placed the burden of proof upon CBS, as the plaintiff, to prove that it was not, for he concluded that there was no restraint of trade if direct licensing was feasible. After carefully analyzing the evidence CBS offered, Judge Lasker concluded that "CBS has failed to prove the factual predicate of its claims—the non-availability of alternatives to the blanket license . . . ." 400 F.Supp. at 780-81. That ultimate finding is abundantly supported by subsidiary findings and by the record, which completely refute all of CBS's allegations of barriers to direct licensing.

CBS maintained that the existing market structure created by the blanket license effectively prevented it from seeking direct licensing because any money spent to acquire performance rights from individual copyright owners would be wasted once CBS had already paid ASCAP and BMI for performance rights to all music. However, nothing prevented CBS from attempting to obtain from the copyright owners performance rights for some interval following expiration of the term of the blanket license.[8]

CBS also contended that there existed no machinery to handle the numerous transactions that would be re-

[8] We were advised at oral argument that at the present time CBS holds no license from ASCAP and has held none since March 1978.

quired to obtain performance rights directly. The record establishes that such machinery is entirely feasible; indeed a single agency now serves as the broker for the thousands of transactions in which copyright owners sell television synch rights and motion picture performance rights. Nevertheless, the claim is pressed that it would take some amount of time and money to establish a similar mechanism for the individual brokering of network television performance rights. We note that Justice Stevens relied on this circumstance to conclude that "real and significant," albeit not "insurmountable" barriers to direct licensing existed. 441 U.S. at 35, 99 S.Ct. at 1570. With deference, we conclude that the evidence and Judge Lasker's analysis of it demonstrate that neither the time nor the expense of creating machinery for direct licensing establishes a barrier of which CBS can complain. It must be recalled that CBS has obtained its performance rights by blanket licenses ever since the late 1940's. Having transacted business in that fashion for that length of time, CBS cannot expect the antitrust laws to assure it that a changeover to direct licensing can be accomplished instantly or at no expense. Moreover, Judge Lasker found that the changeover could be begun very rapidly with CBS meeting its music needs as the machinery for direct licensing was put into place. When Justice Stevens refers to the machinery being created within a year, 441 U.S. at 35, 99 S.Ct. at 1570, he is citing the outer limit testified to by a CBS witness, 400 F.Supp. at 764, whereas Judge Lasker found that "the relatively modest machinery required could be developed during a reasonable planning period." *Id.* at 765. And when Justice Stevens refers to an expenditure of millions of dollars by CBS, he does not mean the cost of creating direct licensing machinery, but

only the payment CBS will make during the final term of its blanket license. But that is an expense for which it bargained and for which it has received considerable value.

Next, CBS argued that individual copyright owners would be reluctant to deal directly with CBS in the licensing of performance rights. At trial this was the so-called "disinclination" issue. Wholly apart from the record, we have some difficulty even contemplating the feared situation of individual songwriters displaying reluctance to arrange to have their songs performed on a national television network, especially one owned by "the giant of the world in the use of music rights." *Id.* at 771. But we need not rely on an intuitive rejection of this CBS claim. Judge Lasker found, after hearing substantial evidence from composers and music publishers, that if CBS were to seek direct licensing, "copyright proprietors would wait at CBS' door." *Id.* at 779.

Finally, CBS alleged a barrier to direct licensing based upon what was called the music-in-the-can problem. CBS apprehended that, without a blanket license, it would be subject to demands for unconscionably high fees from the owners of copyrighted music already recorded on the soundtracks of taped programs and feature films in CBS's inventory. Judge Lasker properly rejected this claim both on the facts and the law. As a matter of fact, he found, based on the testimony, that "holdups" were not realistically to be feared, that synch rights were regularly obtained at fair prices after the recording had been accomplished, that copyright proprietors would not wish to incur CBS's disfavor by attempting a "holdup," and that the whole claim was undercut by the turnover in the CBS inventory. *Id.* at 775—78. Apart from the lack of

factual support for the argument, Judge Lasker also correctly rejected it on the ground that it is not a consequence of the blanket license. If CBS would be vulnerable to a "hold-up" when it tries to acquire performance rights for music on a feature film it wishes to rerun, that is a consequence of CBS's failure to acquire rerun performance rights at the time it acquired the film. At that time CBS accepted the risk that it would one day have to purchase performance rights for reruns, either as part of the purchase price for a blanket license or at a separate price for a license obtained directly from the copyright owner.[9]

Pervading these assessments of each of the CBS contentions of alleged barriers to direct licensing is one indisputable fact that perhaps overshadows all others. If CBS were to forgo the blanket license, seek direct licenses, and then discover, contrary to the facts found by Judge Lasker, that a competitive market among copyright owners was not a feasible alternative to the blanket license, it would be entitled, under the consent decree, to assure itself of continued performing rights by immediately obtaining a renewed blanket license. Indeed, Paragraph IX of the ASCAP decree permits CBS to use any music covered by a license application, without payment of fee, subject to whatever fees are subsequently negotiated or determined to be reasonable by the court if negotiations

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[9] CBS also contends that the blanket license impairs its ability to add films to its inventory. Asserting a disadvantage vis-a-vis its network competitors, CBS alleges that, lacking performance rights, it would be precluded from bidding on films available to networks holding blanket licenses. Apart from the fact that this argument concerns competition among networks, not among copyright owners, it fails to reckon with the possibility that CBS can negotiate an individual license for the performance rights to music on a film, with the license to become effective only upon CBS's acquisition of the film.

fail. *Id.* at 743 n. 3. In short, the District Court has found that CBS can feasibly obtain individual licenses from competing copyright owners and that it incurs no risk in endeavoring to do so. There is no basis in the record for concluding that these findings by the District Court are clearly erroneous.

Of course, the fact that CBS has failed to prove that the blanket license restrains competition among copyright owners does not guarantee that such competition will occur if CBS or the other networks elect to forgo their blanket licenses in the future. Uncertainty is created not only by the normal risks of predicting the future but also by the special circumstances currently governing the selection of music for network television programs. As previously mentioned, approximately 90% of this music is selected by the program packagers. If CBS forgoes its blanket license, we cannot predict—indeed, the record gives us no adequate basis for making a prediction—as to how performance rights for this 90% will be purchased. Perhaps CBS will inform the packagers that it will buy programs only when performance rights have been acquired by the production company. That would create an incentive for the packagers to consider price of performance rights for individual songs in selecting music, especially outside theme or feature music. But the packagers might decline to buy performance rights, preferring to sell their programs to other networks that continue to hold blanket licenses. To the extent that happened, CBS, if it wanted a program for which performance rights had not been purchased, would have to purchase the rights for music already selected and recorded, in which event no meaningful price competition among copyright owners

would occur. Or it may happen that packagers will be so anxious to sell their programs to CBS that they will acquire performance rights, even though that might not be their initial preference.

Another situation for which prediction is hazardous concerns the CBS-produced programs that use music spontaneously selected by the performers. The blanket license, among its other virtues, assures CBS of the right to air such programs, regardless of what music the performers elect to play. Without a blanket license, CBS would have to purchase performance rights after the program was aired, or negotiate with ASCAP for some modified form of program license to secure the right perform any music in the ASCAP repertory only on designated programs where music is spontaneously selected, or forgo the telecasting of such programs.

We mention these alternatives (and there are surely others) not to express any judgment upon them, but simply to point out the difficulty of determining what the market for performance rights will look like if CBS elects to forgo the blanket license. Neither the District Court nor we can predict that perfect competition will ensue. But what the District Court has found, and what we affirm, is that CBS has failed to prove that the existence of the blanket license has restrained competition. Since the blanket license is not a *per se* unlawful arrangement, its restraining effect must be proved before § 1 liability can be found. When, after a full trial, such proof is lacking, the challenge to the blanket license is properly dismissed.

Affirmed.

APPENDIX B

OPINION OF THE COURT OF APPEALS DENYING DEFENDANTS' MOTIONS FOR SUMMARY AFFIRMANCE

REPORTED AT 607 F.2d 543 (2d Cir. 1979)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, *et al.,*

Defendants-Appellees.

No. 1389, Docket 75-7600

July 6, 1979

Before LUMBARD,* MOORE and GURFEIN, Circuit Judges.

MOTION FOR SUMMARY JUDGMENT

Following remand from the Supreme Court, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 to this court upon review on certiorari of our opinion filed August 8, 1977, 562 F.2d 130, BMI and ASCAP move for summary judgment on the ground that CBS failed to raise in this court "the legality of defendants' licensing practices under the rule of reason." Four considerations, among others, impel us to a broad construction of the CBS position in this court.

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* Hon. J. Edward Lumbard, Senior Circuit Judge, has been designated in place of Judge Robert P. Anderson, deceased.

First, the majority opinion by Mr. Justice White "remand[s] the cause for further appropriate proceedings" (99 S.Ct. at 1556) and states that the blanket license "should be subjected to a more discriminatory examination under the rule of reason. It may not ultimately survive the attack, but that is not the issue before us today." 99 S.Ct. at 1565.

Second, the dissenting justice, Mr. Justice Stevens, the only justice to address the merits under the rule of reason standard, actually found the blanket license to be an unreasonable restraint of trade.

Third, the United States in its amicus brief in the Supreme Court took "no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry." 99 S.Ct. at 1560.

Fourth, this court found a lack of market necessity for the blanket license in dealing with the network.

After noting that [w]e have never examined a practice like this one before" (99 S.Ct. at 1557), the Supreme Court did not rule that price-fixing was not involved, which would have been the end of the matter.

Accordingly, we think that, in the interests of an ultimate solution of the question, we must scrutinize CBS' arguments in terms of whether it intended to waive a claim under the rule of reason standard, considering the breadth of its arguments. We find no such intent. The emphasis was simply on the harder point, *per se* unlawfulness, but CBS did argue the practical effects of the blanket license, and did not exclude an application of the rule of reason standard thereto.

We will not, at this time, expand on the relationship between the standard which we set that market necessity (limited to television networks) might justify the price-fixing aspect of the exclusive blanket license and a rule of reason standard, since we do not wish to foreclose unrestricted arguments on the issue.

We are convinced, moreover, that in the state of the law on price-fixing *per se* in 1977 and in the light of the CBS economic impact arguments relating to the alleged unreasonable restraint of the exclusive blanket license, both in terms of tie-in and price effect, the issue was presented clearly enough to this court for us to have passed on the question under the rule of reason.

We conclude, in the circumstances, that it would be inequitable to hold, on narrow, technical or semantic grounds that appellant did not raise the question adequately.

We, accordingly, deny the motion for summary judgment, and issue a scheduling order for briefing.

SCHEDULING ORDER

On remand from the Supreme Court, having denied summary judgment of the decision of the District Court, we order:

(1) that the parties address the issue of whether on the present record in the District Court, this court is in a position to decide whether the exclusive blanket license tendered to CBS television network by ASCAP and BMI is unlawful price-fixing and an unreasonable restraint of trade under the rule of reason or as a misuse of copyright?

(2) if such record is inadequate, what is proposed for the further progress of the case?

(3) if the record is adequate, should the exclusive tender of a blanket or program license to the CBS television network be prohibited or limited under the rule of reason, or as a misuse of copyright?

(4) if, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP or BMI to issue a blanket license to a television network for a single fee, would it necessarily be illegal to negotiate and issue blanket licenses to individual radio or television stations or to other users who perform copyrighted music for profit? *See* 99 S.Ct. at 1561.

(5) if, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP and BMI to issue a blanket license to a television network for a single fee, would it be equally illegal for the members to authorize ASCAP to issue licenses for individual compositions based on prices determined by the copyright owners?

It is further requested that the United States, pursuant to the suggestion of the Supreme Court (99 S.Ct. at 1565 n. 44) continue in its role as amicus curiae and file a brief concerning these issues at the time when appellee's brief is to be filed.

We note that if a party should desire to seek relief with respect to the interim arrangement for license fees payable to CBS, application may be made to Judge Lasker or, if there be doubt as to his jurisdiction, application may be made to this court for a remand for that purpose.

The parties will confer on a scheduling arrangement for briefs and oral argument with the Office of Staff Counsel.

APPENDIX C

OPINION OF THE SUPREME COURT

REPORTED AT 441 U.S. 1 (1979)

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1978

BROADCAST MUSIC, INC., ET AL.
Petitioners,

—against—

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77-1578

Argued January 15, 1979

Decided April 17, 1979*

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. C-26.

Amalya L. Kearse argued the cause for petitioners in No. 77-1578. With her on the briefs were *George A. Davidson* and *Conley E. Brian, Jr. Jay Topkis* argued the cause for petitioners in No. 77-1583. With him on the briefs were *Bernard Korman, Simon H. Rifkind, Herman Finkelstein*, and *Allan Blumstein*.

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* Together with No. 77-1583, *American Society of Composers, Authors and Publishers et al. v. Columbia Broadcasting System, Inc. et al.*, also on certiorari to the same court.

Alan J. Hruska argued the cause for respondents in both cases. With him on the briefs were *John D. Appel* and *Robert M. Sondak.*

Deputy Solicitor General Easterbrook argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Shenefield, William Alsup, John J. Powers III,* and *Andrea Limmer.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates.[1] The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

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† Briefs of *amici curiae* urging reversal were filed by *Irwin Karp* for the Authors League of America, Inc.; by *Philip Elman* and *Robert M. Lichtman* for the Performing Right Society, Ltd., et al.; and by *Robert H. Bork* for Aaron Copland et al.

Briefs of *amici curiae* urging affirmance were filed by *Ira M. Millstein* for the All-Industry Television Music License Committee; by *Clarence Fried* for American Broadcasting Companies, Inc.; by *David R. Hyde* for National Broadcasting Company, Inc.; by *John H. Midlen, Jr.*, for National Religious Broadcasters, Inc.; and by *John L. Hill*, Attorney General of Texas, *David M. Kendall*, First Assistant Attorney General, and *Robert S. Bickerstaff* and *Susan Dasher*, Assistant Attorneys General, for the Universities of the State of Texas et al.

Irving Moskovitz filed a brief for the All-Industry Radio Music License Committee as *amicus curiae.*

[1] The District Court certified the case as a defendant class action, 400 F. Supp. 737, 741 n. 2 (SDNY 1975).

I

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated stations and telecasting approximately 7,500 network programs per year. Many, but not all, of these programs make use of copyrighted music recorded on the soundtrack. CBS also owns television and radio stations in various cities. It is " 'the giant of the world in the use of music rights,'" the "'No. 1 outlet in the history of entertainment.'" [2]

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit,[3] but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. "ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems" associated with the licensing of music. 400 F. Supp. 737, 741 (SDNY 1975). As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

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[2] *Id.*, at 771, quoting a CBS witness. CBS is also a leading music publisher, with publishing subsidiaries affiliated with both ASCAP and BMI, and is the world's largest manufacturer and seller of records and tapes. *Ibid.*

[3] Act of Jan. 6, 1897, 29 Stat. 481.

BMI, a nonprofit corporation owned by members of the broadcasting industry,[4] was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI. Until this litigation, CBS held blanket licenses from both organizations for its television network on a continuous basis since the late 1940's and had never attempted to secure any other form of license from either ASCAP[5] or any of its members. *Id.*, at 752-754.

The complaint filed by CBS charged various violations of the Sherman Act[6] and the copyright laws.[7] CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful

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[4] CBS was a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959. 400 F. Supp., at 742.

[5] Unless the context indicates otherwise, references to ASCAP alone in this opinion usually apply to BMI as well. See n. 20, *infra*.

[6] 15 U. S. C. §§1 and 2.

[7] CBS seeks injunctive relief for the antitrust violations and a declaration of copyright misuse. 400 F. Supp., at 741.

tying arrangement, a concerted refusal to deal, and a misuse of copyrights. The District Court, though denying summary judgment to certain defendants, ruled that the practice did not fall within the *per se* rule. 337 F. Supp. 394, 398 (SDNY 1972). After an 8-week trial, limited to the issue of liability, the court dismissed the complaint, rejecting again the claim that the blanket license was price fixing and a *per se* violation of § 1 of the Sherman Act, and holding that since direct negotiation with individual copyright owners is available and feasible there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization. 400 F. Supp., at 781-783.

Though agreeing with the District Court's factfinding and not disturbing its legal conclusions on the other antitrust theories of liability,[8] the Court of Appeals held that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act. 562 F. 2d 130, 140 (CA2 1977). This conclusion, without more, settled the issue of liability under the Sherman Act, established copyright misuse,[9] and required reversal of the District Court's judgment, as well as a remand to consider the appropriate remedy.[10]

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[8] The Court of Appeals affirmed the District Court's rejection of CBS's monopolization and tying contentions but did not rule on the District Court's conclusion that the blanket license was not an unreasonable restraint of trade. See 562 F. 2d 130, 132, 135, 141 n. 29 (CA2 1977).

[9] At CBS's suggestion, the Court of Appeals held that the challenged conduct constituted misuse of copyrights solely on the basis of its finding of unlawful price fixing. *Id.*, at 141 n. 29.

[10] The Court of Appeals went on to suggest some guidelines as to remedy, indicating that despite its conclusion on liability the blanket license was not totally forbidden. The Court of Appeals said:

"Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing—in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or

ASCAP and BMI petitioned for certiorari, presenting the questions of the applicability of the *per se* rule and of whether this constitutes misuse of copyrights. CBS did not cross petition to challenge the failure to sustain its other antitrust claims. We granted certiorari because of the importance of the issues to the antitrust and copyright laws. 439 U. S. 817 (1978). Because we disagree with the Court of Appeals' conclusions with respect to the *per se* illegality of the blanket license, we reverse its judgment and remand the cause for further appropriate proceedings.

II

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 (1977), and so often "lack . . . any redeeming virtue," *Northern Pac. R. Co.* v.

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negotiations for direct licenses, the blanket license need not be prohibited in all circumstances. The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others.

"Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing." *Id*, at 440 (footnotes omitted).

United States, 356 U. S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement.[11] And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.[12] But easy labels do not always supply ready answers.

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To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells.[13] But this is not a question simply of determining

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[11] "This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958).
See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 n. 16 (1977); *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 n. 10 (1972).

[12] See cases discussed in n. 14, *infra*.

[13] CBS also complains that it pays a flat fee regardless of the amount of use it makes of ASCAP compositions and even though many of its programs contain little or no music. We are unable to see how that alone could make out an antitrust violation or misuse of copyrights:
"Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. . . . Petitioner cannot complain because it must pay royalties whether it uses Hazeltine

whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), aff'd, 175 U. S. 211 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always, be a simple matter.[14]

Consequently, as we recognized in *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 607-608 (1972), "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se*

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patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them." *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 834 (1950).
See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969).

[14] Cf., *e.g.*, *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) (manufacturer/wholesaler agreed with independent wholesalers on prices to be charged on products it manufactured); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) (firms controlling a substantial part of an industry agreed to purchase "surplus" gasoline with the intent and necessary effect of increasing the price); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927) (manufacturers and distributors of 82% of certain vitreous pottery fixtures agreed to sell at uniform prices).

violations . . . ." See *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*." 562 F. 2d, at 132. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade.

B

This and other cases involving ASCAP and its licensing practices have arisen out of the efforts of the creators of copyrighted musical compositions to collect for the public performance of their works, as they are entitled to do under the Copyright Act. As already indicated, ASCAP and BMI originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, "[n]either ASCAP nor BMI is a stranger to antitrust litigation." 400 F. Supp., at 743.

The Department of Justice first investigated allegations of anticompetitive conduct by ASCAP over 50 years ago.[15] A criminal complaint was filed in 1934, but the Government was granted a midtrial continuance and never returned to the courtroom. In separate complaints in 1941, the United States charged that the blanket

[15] Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo. L. J. 407, 424 n. 91 (1941).

license, which was then the only license offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool.[16] The Government sought to enjoin ASCAP's exclusive licensing powers and to require a different form of licensing by that organization. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations.[17] Following complaints relating to the television industry, successful private litigation against ASCAP by movie theatres,[18] and a Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950.[19]

Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the owner have requested it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions,

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[16] *E. g.*, complaint in *United States* v. *ASCAP*, Civ. No. 13-95 (SDNY 1941), pp. 3-4.

[17] *United States* v. *ASCAP*, 1940-1943 Trade Cases ¶ 56,104 (SDNY 1941).

[18] See *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (SDNY 1948); *M. Witmark & Sons* v. *Jenson*, 80 F. Supp. 843 (Minn. 1948), appeal dismissed *sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F. 2d 515 (CA8 1949).

[19] *United States* v. *ASCAP*, 1950-1951 Trade Cases ¶ 62,595 (SDNY 1950).

either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.[20]

The 1950 decree, as amended from time to time, continues in effect, and the blanket license continues to be the primary instrument through which ASCAP conducts its business under the decree. The courts have twice construed the decree not to require ASCAP to issue licenses for selected portions of its repertory.[21] It also remains true that the decree guarantees the legal availability of direct licensing of performance rights by ASCAP members; and the District Court found, and in

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[20] BMI is in a similar situation. The original decree against BMI is reported as *United States* v. *BMI*, 1940-1943 Trade Cases ¶ 56,096 (ED Wis. 1941). A new consent judgment was entered in 1966 following a monopolization complaint filed in 1964. *United States* v. *BMI*, 1966 Trade Cases ¶ 71,941 (SDNY). The ASCAP and BMI decrees do vary in some respects. The BMI decree does not specify that BMI may only obtain nonexclusive rights from its affiliates or that the District Court may set the fee if the parties are unable to agree. Nonetheless, the parties stipulated, and the courts below accepted, "that CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members." 400 F. Supp., at 745.

[21] *United States* v. *ASCAP* (*Application of Shenandoah Valley Broadcasting, Inc.*), 208 F. Supp. 896 (SDNY 1962), aff'd, 331 F.2d 117 (CA2), cert. denied, 377 U. S. 997 (1964); *United States* v. *ASCAP* (*Application of National Broadcasting Co.*), 1971 Trade Cases ¶ 73,491 (SDNY 1970). See also *United States* v. *ASCAP* (*Motion of Metromedia, Inc.*), 341 F.2d 1003 (CA2 1965).

this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so. Since 1946, CBS and other television networks have taken blanket licenses from ASCAP and BMI. It was not until this suit arose that the CBS network demanded any other kind of license.[22]

Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. See *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683, 690 (1961), which involved this same decree. But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices.[23] In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain.[24] Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a

[22] NBC did, in 1971, request an annual blanket license for 2,217 specific ASCAP compositions most frequently used on its variety shows. It intended to acquire the remaining rights to background and theme music through direct transactions by it and its program packagers. See *United States* v. *ASCAP (Application of National Broadcasting Co.)*, *supra*.

[23] 1950-1951 Trade Cases ¶ 62,595, p. 63,756.

[24] Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S., at 50 n. 16. Moreover, unthinking application of the *per se* rule might upset the balancing of economic power and of procompetitive and anticompetitive effects presumably worked out in the decree.

fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice. See *id.*, at 694-695. That fact alone might not remove a naked price-fixing scheme from the ambit of the *per se* rule, but, as discussed *infra*, Part III, here we are uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition among the individual composers.

After the consent decrees, the legality of the blanket license was challenged in suits brought by certain ASCAP members against individual radio stations for copyright infringement. The stations raised as a defense that the blanket license was a form of price fixing illegal under the Sherman Act. The parties stipulated that it would be nearly impossible for each radio station to negotiate with each copyright holder separate licenses for the performance of his works on radio. Against this background, and relying heavily on the 1950 consent judgment, the Court of Appeals for the Ninth Circuit rejected claims that ASCAP was a combination in restraint of trade and that the blanket license constituted illegal price fixing. *K 91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (1967), cert. denied, 389 U. S. 1045 (1968).

The Department of Justice, with the principal responsibility for enforcing the Sherman Act and administering the consent decrees relevant to this case, agreed with the result reached by the Ninth Circuit. In a submission *amicus curiae* opposing one station's petition for certiorari in this Court, the Department stated that there must be "some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them." Memorandum for United

States as *Amicus Curiae* on Pet. for Cert. in *K-91, Inc.* v. *Gershwin Publishing Corp.*, O. T. 1967, No. 147, pp. 10-11. And the Department elaborated on what it thought that fact meant for the proper application of the antitrust laws in this area:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U. S. 1; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; *Chicago Board of Trade* v. *United States*, 246 U. S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music." *Id.*, at 10 (footnote omitted).

The Depa_tment concluded that, in the circumstances of that case, the blanket licenses issued by ASCAP to individual radio stations were neither a *per se* violation of the Sherman Act nor an unreasonable restraint of trade.

As evidenced by its *amicus* brief in the present case, the Department remains of that view. Furthermore, the

United States disagrees with the Court of Appeals in this case and urges that the blanket licenses, which the consent decree authorizes ASCAP to issue to television networks, are not *per se* violations of the Sherman Act. It takes no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry.

Finally, we note that Congress itself, in the new Copyright Act, has chosen to employ the blanket license and similar practices. Congress created a compulsory blanket license for secondary transmissions by cable television systems and provided that "[n]otwithstanding any provisions of the antitrust laws, . . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." 17 U. S. C. App. § 111 (d)(5)(A). And the newly created compulsory license for the use of copyrighted compositions in jukeboxes is also a blanket license, which is payable to the performing-rights societies such as ASCAP unless an individual copyright holder can prove his entitlement to a share, § 116(c)(4). Moreover, in requiring noncommercial broadcasters to pay for their use of copyrighted music, Congress again provided that "[n]otwithstanding any provision of the antitrust laws" copyright owners "may designate common agents to negotiate, agree to, pay, or receive payments." § 118(b). Though these provisions are not directly controlling, they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances.

There have been District Court cases holding various ASCAP practices, including its licensing practices, to be

violative of the Sherman Act,[25] but even so, there is no nearly universal view that either the blanket or the per-program licenses issued by ASCAP at prices negotiated by it are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason.

III

Of course, we are no more bound than is CBS by the views of the Department of Justice, the results in the prior lower court cases, or the opinions of various experts about the merits of the blanket license. But while we must independently examine this practice, all those factors should caution us against too easily finding blanket licensing subject to *per se* invalidation.

A

As a preliminary matter, we are mindful that the Court of Appeals' holding would appear to be quite difficult to contain. If, as the court held, there is a *per se* antitrust violation whenever ASCAP issues a blanket license to a television network for a single fee, why would it not also be automatically illegal for ASCAP to negotiate and issue blanket licenses to individual radio or television stations or to other users who perform copyrighted music

[25] See cases cited n. 18, *supra*. Those cases involved licenses sold to individual movie theaters to "perform" compositions already on the motion pictures' soundtracks. ASCAP had barred its members from assigning performing rights to movie producers at the same time recording rights were licensed, and the theaters were effectively unable to engage in direct transactions for performing rights with individual copyright owners.

for profit?[26] Likewise, if the present network licenses issued through ASCAP on behalf of its members are *per se* violations, why would it not be equally illegal for the members to authorize ASCAP to issue licenses establishing various categories of uses that a network might have for copyrighted music and setting a standard fee for each described use?

Although the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the *per se* rule does not accommodate itself to such flexibility and that the observations of the Court of Appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability.[27]

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[26] Certain individual television and radio stations, appearing here as *amici curiae*, argue that the *per se* rule should extend to ASCAP's blanket licenses with them as well. The television stations have filed an antitrust suit to that effect. *Buffalo Broadcasting Co.* v. *ASCAP*, 78 Civ. 5670 (SDNY, filed Nov. 27, 1978).

[27] See n. 10, *supra*. The Court of Appeals would apparently not outlaw the blanket license across the board but would permit it in various circumstances where it is deemed necessary or sufficiently desirable. It did not even enjoin blanket licensing with the television networks, the relief it realized would normally follow a finding of *per se* illegality of the license in that context. Instead, as requested by CBS, it remanded to the District Court to require ASCAP to offer in addition to blanket licensing some competitive form of per-use licensing. But per-use licensing by ASCAP, as recognized in the consent decrees, might be even more susceptible to the *per se* rule than blanket licensing.

The rationale for this unusual relief in a *per se* case was that "[t]he blanket license is not simply a 'naked restraint' ineluctably doomed to extinction." 562 F.2d, at 140. To the contrary, the Court of Appeals found that the blanket license might well "serve a market need" for some. *Ibid.* This, it seems to us, is not the *per se* approach, which does not yield so readily to circumstances, but in effect is a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint.

CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use. 400 F. Supp., at 747 n. 7.[28] But if this in itself or in conjunction with blanket licensing constitutes illegal price fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works.[29] Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are quite sure, however, that the *per se* rule does not require any such holding.

B

In the first place, the line of commerce allegedly being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws. Those who would use copyrighted music in public performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement and, if the conduct is willful and for the purpose of financial gain, to criminal penalties.[30] Furthermore, noth-

[28] Surely, if ASCAP abandoned the issuance of all licenses and confined its activities to policing the market and suing infringers, it could hardly be said that member copyright owners would be in violation of the antitrust laws by not having a common agent issue per-use licenses. Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent. Cf. *Zenith Radio Corp* v. *Hazeltine Research, Inc.*, 395 U. S., at 139-140.

[29] In its complaint, CBS alleged that it would be "wholly impracticable" for it to obtain individual licenses directly from the composers and publishing houses, but it now says that it would be willing to do exactly that if ASCAP were enjoined from granting blanket licenses to CBS or its competitors in the network television business.

[30] 17 U. S. C. App. § 506.

ing in the Copyright Act of 1976 indicates in the slightest that Congress intended to weaken the rights of copyright owners to control the public performance of musical compositions. Quite the contrary is true.[31] Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.[32]

C

More generally, in characterizing this conduct under the *per se* rule,[33] our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436 n. 13

[31] See Koenigsberg, The 1976 Copyright Act: Advances for the Creator, 26 Cleve. St. L. Rev. 515, 524, 528 (1977).

[32] Cf. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963). Because a musical composition can be "consumed" by many different people at the same time and without the creator's knowledge, the "owner" has no real way to demand reimbursement for the use of his property except through the copyright laws *and* an effective way to enforce those legal rights. See *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 162 (1975). It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use.

[33] The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 690-692 (1978), or else we should apply the rule of reason from the start. That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint.

(1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id.*, at 441 n. 16; see *National Society of Professional Engineers* v. *United States*, 435 U. S., at 688; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S., at 50 n. 16; *Northern Pac. R. Co.* v. *United States*, 356 U. S., at 4.

The blanket license, as we see it, is not a "naked restrain[t] of trade with no purpose except stifling of competition," *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963), but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. See L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154 (1977). As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace; thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, 562 F. 2d, at 140 n. 26, and it was in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public-performance rights organized itself largely around the single-fee blanket license, which gave unlimited access to the repertory and reliable protection against infringement. When ASCAP's major and user-created competitor, BMI, came on the scene, it also turned to the blanket license.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public.[34] But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands,[35] of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for.[36] ASCAP also provides the necessary resources for blanket sales and enforcement,

[34] And of course changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.

[35] The District Court found that CBS would require between 4,000 and 8,000 individual license transactions per year. 400 F. Supp., at 762.

[36] To operate its system for distributing the license revenues to its members, ASCAP relies primarily on the networks' records of which compositions are used.

resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

D

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations,[37] and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package,[38] and even small performing-rights societies that have occasionally arisen to compete with

[37] See Timberg, The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950, 19 Law & Contemp. Prob. 294, 297 (1954) ("The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author"). Significantly, ASCAP deals only with nondramatic performance rights. Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. The same is true of various other rights, such as sheet music, recording, and synchronization, which are licensed on an individual basis.

[38] Cf. *United States* v. *Grinnell Corp.*, 384 U. S. 563, 572-573 (1966); *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 356-357 (1963).

ASCAP and BMI have offered blanket licenses.[39] Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.[40] ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively.[41]

E

Finally, we have some doubt—enough to counsel against application of the *per se* rule—about the extent to which this practice threatens the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226 n. 59 (1940), that is, competitive pricing as the free market's means of allocating resources. Not all arrangements among actual or potential competitors that

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[39] Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind. L. J. 168, 170 (1950). See also Garner, *United States* v. *ASCAP*: The Licensing Provisions of the Amended Final Judgment of 1950, 23 Bull. Copyright Soc. 119, 149 (1975) ("no performing rights are licensed on other than a blanket basis in any nation in the world").

[40] Moreover, because of the nature of the product—a composition can be simultaneously "consumed" by many users—composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even within the blanket license in terms of productivity and consumer satisfaction.

[41] Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S., at 217 (distinguishing *Chicago Bd. of Trade* v. *United States*, 246 U. S. 231 (1918), on the ground that among the effects of the challenged rule there "was the creation of a public market"); *United States* v. *Trenton Potteries Co.*, 273 U. S., at 401 (distinguishing *Chicago Bd. of Trade* on the ground that it did not involve "a price agreement among competitors in an open market").

have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have not agreed either to sell individually in any other market or to use the blanket license to mask price fixing in such other markets.[42] Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored. The District Court found that there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice.

With this background in mind, which plainly enough indicates that over the years, and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical com-

[42] "CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them." 400 F. Supp., at 748.

positions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.

IV

As we have noted, n. 27, *supra*, the enigmatic remarks of the Court of Appeals with respect to remedy appear to have departed from the court's strict, *per se* approach and to have invited a more careful analysis. But this left the general import of its judgment that the licensing practices of ASCAP and BMI under the consent decree are *per se* violations of the Sherman Act. We reverse that judgment, and the copyright misuse judgment dependent upon it, see n. 9, *supra*, and remand for further proceedings to consider any unresolved issues that CBS may have properly brought to the Court of Appeals.[13] Of course, this will include an assessment under the rule of reason of the blanket license as employed in the television industry, if that issue was preserved by CBS in the Court of Appeals.[14]

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[13] It is argued that the judgment of the Court of Appeals should nevertheless be affirmed on the ground that the blanket license is a tying arrangement in violation of § 1 of the Sherman Act or on the ground that ASCAP and BMI have monopolized the relevant market contrary to § 2. The District Court and the Court of Appeals rejected both submissions, and we do not disturb the latter's judgment in these respects, particularly since CBS did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain its tying and monopolization claims.

[14] The Court of Appeals did not address the rule-of-reason issue, and BMI insists that CBS did not preserve the question in that court. In any event, if the issue is open in the Court of Appeals, we prefer that that court first address the matter. Because of the United States' interest in the enforcement of the consent decree, we assume it will continue to play a role in this litigation on remand.

The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, dissenting.

The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the case to the Court of Appeals, leaving open the question whether the blanket license as employed by ASCAP and BMI is unlawful under a rule-of-reason inquiry. I think that question is properly before us now and should be answered affirmatively.

There is ample precedent for affirmance of the judgment of the Court of Appeals on a ground that differs from its rationale, provided of course that we do not modify its judgment.[1] In this case, the judgment of the Court of Appeals was not that blanket licenses may never be offered by ASCAP and BMI. Rather, its judgment directed the District Court to fashion relief requiring them to offer additional forms of license as well.[2] Even though that judgment may not be consistent with its stated conclusion that the blanket license is "illegal *per se*" as a kind of price fixing, it is entirely consistent with a conclusion that petitioners' exclusive all or-nothing blanket-license policy violates the rule of reason.[3]

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[1] See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n. 8; *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419; *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U. S. 479, 480-481; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435.

[2] 562 F. 2d 130, 140-141 (CA2 1977).

[3] See *ante*, at [C-17 n.27] (describing relief ordered by Court of Appeals as "unusual" for a *per se* case, and suggesting that that court's decision appears more consistent with a rule-of-reason approach).

The Court of Appeals may well so decide on remand. In my judgment, however, a remand is not necessary.[4] The record before this Court is a full one, reflecting extensive discovery and eight weeks of trial. The District Court's findings of fact are thorough and well supported. They clearly reveal that the challenged policy does have a significant adverse impact on competition. I would therefore affirm the judgment of the Court of Appeals.

I

In December 1969, the president of the CBS television network wrote to ASCAP and BMI requesting that each "promptly . . . grant a new performance rights license which will provide, effective January 1, 1970, for payments measured by the actual use of your music."[5] ASCAP and BMI each responded by stating that it considered CBS's request to be an application for a license in accordance with the provisions of its consent decree and would treat it as such,[6] even though neither decree provides for licensing

[4] That the rule-of-reason issues have been raised and preserved throughout seems to me clear. See 562 F. 2d, at 134. ("CBS contends that the blanket licensing method is not only an illegal tie-in or blockbooking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a per se violation . . ."); *id.*, at 141 n. 29 ("As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record"); Brief for Respondents 41.

[5] 400 F. Supp. 737, 753 (SDNY 1975).

[6] ASCAP responded in a letter from its general counsel, stating that it would consider the request at its next board of directors meeting, and that it regarded it as an application for a license consistent with the decree. The letter from BMI's president stated: "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." *Id.*, at 753-754.

on a per-composition or per-use basis.[7] Rather than pursuing further discussion, CBS instituted this suit.

Whether or not the CBS letter is considered a proper demand for per-use licensing is relevant, if at all, only on the question of relief. For the fact is, and it cannot seriously be questioned, that ASCAP and BMI have steadfastly adhered to the policy of only offering overall blanket or per-program licenses,[8] notwithstanding requests for more limited authorizations. Thus, ASCAP rejected a 1971 request by NBC for licenses for 2,217 specific compositions,[9] as well as an earlier request by a group of television stations for more limited authority than the blanket licenses which they were then purchasing.[10] Neither ASCAP nor BMI has ever offered to license anything less than its entire portfolio, even on an experimental basis. Moreover, if the response to the CBS letter were not sufficient to characterize their consistent policy, the defense of this lawsuit surely is. It is the refusal to license anything less than the entire repertoire—rather than the decision to offer blanket licenses themselves—that raises the serious antitrust questions in this case.

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[7] See *ante*, at [C-11 & n.21].

[8] The 1941 decree requires ASCAP to offer per-program licenses as an alternative to the blanket license. *United States* v. *ASCAP*, 1940-1943 Trade Cases ¶ 56,104, p. 404 (SDNY). Analytically, however, there is little difference between the two. A per-program license also covers the entire ASCAP repertoire; it is therefore simply a miniblanket license. As is true of a long-term blanket license, the fees set are in no way dependent on the quantity or quality of the music used. See *infra*, at 30-33.

[9] See *United States* v. *ASCAP* (*Application of National Broadcasting Co.*), 1971 Trade Cases ¶ 73,491 (SDNY 1970).

[10] See *United States* v. *ASCAP* (*Application of Shenandoah Valley Broadcasting, Inc.*), 208 F. Supp. 896 (SDNY 1962), aff'd, 331 F. 2d 117 (CA2 1964), cert. denied, 377 U. S. 997.

II

Under our prior cases, there would be no question about the illegality of the blanket-only licensing policy if ASCAP and BMI were the exclusive sources of all licenses. A copyright, like a patent, is a statutory grant of monopoly privileges. The rules which prohibit a patentee from enlarging his statutory monopoly by conditioning a license on the purchase of unpatented goods,[11] or by refusing to grant a license under one patent unless the licensee also takes a license under another, are equally applicable to copyrights.[12]

It is clear, however, that the mere fact that the holder of several patents has granted a single package license covering them all does not establish any illegality. This point was settled by *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 834, and reconfirmed in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 137-138. The Court is therefore unquestionably correct in its conclusion that ASCAP's issuance of blanket licenses covering its entire inventory is not, standing alone, automatically unlawful. But both of those cases identify an important limitation on this rule. In the former, the Court was careful to point out that the record did not present the question whether the package license would have been unlawful if Hazeltine had refused to license on any other basis. 339 U. S., at 831. And in the

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[11] *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *International Business Machines Corp.* v. *United States*, 298 U. S. 131; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451.

[12] Indeed, the leading cases condemning the practice of "block-booking" involved copyrighted motion pictures, rather than patents. See *United States* v. *Paramount Pictures*, 334 U. S. 131; *United States* v. *Loew's Inc.*, 371 U. S. 38.

latter case, the Court held that the package license was illegal because of such a refusal. 395 U. S., at 140-141.

Since ASCAP offers only blanket licenses, its licensing practices fall on the illegal side of the line drawn by the two *Hazeltine* cases. But there is a significant distinction: unlike Hazeltine, ASCAP does not have exclusive control of the copyrights in its portfolio, and it is perfectly possible—at least as a legal matter—for a user of music to negotiate directly with composers and publishers for whatever rights he may desire. The availability of a practical alternative alters the competitive effect of a blockbooking or blanket-licensing policy. ASCAP is therefore quite correct in its insistence that its blanket license cannot be categorically condemned on the authority of the blockbooking and package-licensing cases. While these cases are instructive, they do not directly answer the question whether the ASCAP practice is unlawful.

The answer to that question depends on an evaluation of the effect of the practice on competition in the relevant market. And, of course, it is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market.[13] We

[13] See *Tampa Electric Co.* v. Nashville Coal Co., 365 U. S. 320, 334 (upholding requirements contract on the ground that "[t]here is here neither a seller with a dominant position in the market as in *Standard Fashion* [*Co.* v. *Magrane-Houston Co.*, 258 U. S. 346]; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil* [*Co.* v. *United States*, 337 U. S. 293]; nor a plainly restrictive tying arrangement as in *International Salt* [*Co.* v. *United States*, 332 U. S. 392]"); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 610-612 (upholding challenged advertising practice because, while the volume of commerce affected was not "'insignificant or insubstantial,'" seller

therefore must consider what the record tells us about the competitive character of this market.

III

The market for music at issue here is wholly dominated by ASCAP-issued blanket licenses.[14] Virtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI. And again, virtually without exception, the only means that has been used to secure authority to perform such compositions is the blanket license.

The blanket all-or-nothing license is patently discriminatory.[15] The user purchases full access to ASCAP's entire repertoire, even though his needs could be satisfied by a far more limited selection. The price he pays for this access is unrelated either to the quantity or the quality of

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was found not to occupy a "dominant position" in the relevant market). While our cases make clear that a violation of the Sherman Act requires both that the volume of commerce affected be substantial and that the seller enjoy a dominant position, see *id.*, at 608-609, proof of actual compulsion has not been required, but cf. *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 251 (CA2 1959), cert. denied, 361 U. S. 885; *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561 (CA7 1951), cert. denied, 342 U. S. 909. The critical question is one of the likely practical effect of the arrangement: whether the "court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric Co.* v. *Nashville Coal Co.*, *supra*, at 327

[14] As in the majority opinion, my references to ASCAP generally encompass BMI as well.

[15] See Cirace, *CBS* v. *ASCAP*: An Economic Analysis of A Political Problem, 47 Ford. L. Rev. 277, 286 (1978) ("the all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms").

the music he actually uses, or, indeed, to what he would probably use in a competitive system. Rather, in this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues,[16] a measure that reflects the customer's ability to pay[17] but is totally unrelated to factors—such as the cost, quality, or quantity of the product—that normally affect price in a competitive market. The ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what is "reasonable" for the access they are getting,[18] may well be far higher than what they would choose to spend for music in a competitive system. It is a classic example of economic discrimination.

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[16] For many years prior to the commencement of this action, the BMI blanket-license fee amounted to 1.09% of net receipts from sponsors after certain specified deductions. 400 F. Supp., at 743. The fee for access to ASCAP's larger repertory was set at 2.5% of net receipts; in recent years, however, CBS has paid a flat negotiated fee, rather than a percentage, to ASCAP. 23 Jt. App. in CA2 No. 75-7600, pp. E1051-E1052, E1135.

[17] See Cirace, *supra*, at 288:

"This history indicates that, from its inception, ASCAP exhibited a tendency to discriminate in price. A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay. The effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license."

[18] Under the ASCAP consent decree, on receipt of an application, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on the fee within 60 days of the application, the applicant may apply to the United States District Court for the Southern District of New York for the determination of a "reasonable fee." *United States* v. *ASCAP*, 1950-1951 Trade Cases ¶62,595, p. 63,754 (SDNY 1950). The BMI decree contains no similar provision for judicial determination of a reasonable fee.

The record plainly establishes that there is no price competition between separate musical compositions.[19] Under a blanket license, it is no more expensive for a network to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music,[20] the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity,

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[19] ASCAP's economic expert, Robert Nathan, was unequivocal on this point:

"Q. Is there price competition under this system between separate musical compositions?

"A. No sir." Tr. 3983.

[20] See 562 F. 2d, at 136 n. 15. In determining royalties ASCAP distinguishes between feature, theme, and background uses of music. The 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to the performance of the compositions." The 1960 decree provided for the additional option of receiving royalties under a deferred plan which provides additional compensation based on length of membership and the recognized status of the individual's works. See *United States* v. *ASCAP*, 1960 Trade Cases ¶ 69,612, pp. 76,469-76,470 (SDNY 1960).

however unlikely it may be, is characteristic of a cartelized rather than a competitive market.[21]

The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited—and thus less restrictive—licenses by ASCAP is not feasible. The District Court's findings disclose no reason why music-performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP. In fact, ASCAP now compensates composers and publishers on precisely those bases.[22] If distributions of royalties can be calculated on a per-use and per-composition basis, it is difficult to see why royalties could not also be collected in the same way. Moreover, the record also shows that where ASCAP's blanket-license scheme does not govern, competitive markets do. A competitive market for "synch" rights exists,[23] and after the use of blanket licenses in the motion picture industry was discontinued,[24] such a market promptly developed in that industry.[25] In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all.

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[21] See generally 2 P. Areeda & D. Turner, Antitrust Law 280-281, 342-345 (1978); Cirace, *supra* n. 15, at 286-292.

[22] See n. 20, *supra*.

[23] The "synch" right is the right to record a copyrighted song in synchronization with the film or videotape, and is obtained separately from the right to perform the music. It is the latter which is controlled by ASCAP and BMI. See *CBS, Inc.* v. *ASCAP*, 400 F. Supp., at 743.

[24] See *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (SDNY 1948).

[25] See 400 F. Supp., at 759-763; 5 Jt. App. in CA2 No. 75-7600, pp. 775-777 (testimony of Albert Berman, managing director of the Harry Fox Agency, Inc.). Television synch rights and movie performance and synch rights are handled by the Fox Agency, which serves as the broker for thousands of music publishers.

IV

Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably. ASCAP argues, however, that at least as to CBS, there has been no restraint at all since the network is free to deal directly with copyright holders.

The District Court found that CBS had failed to establish that it was compelled to take a blanket license from ASCAP. While CBS introduced evidence suggesting that a significant number of composers and publishers, satisfied as they are with the ASCAP system, would be "disinclined" to deal directly with the network, the court found such evidence unpersuasive in light of CBS's substantial market power in the music industry and the importance to copyright holders of network television exposure.[26] Moreover, it is arguable that CBS could go further and, along with the other television networks, use its economic resources to exploit destructive competition among purveyors of music by driving the price of performance rights down to a far lower level. But none of this demonstrates that ASCAP's practices are lawful, or that ASCAP cannot be held liable for injunctive relief at CBS's request.

The fact that CBS has substantial market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. Indeed, even if the victim of a conspiracy is himself a wrongdoer, he has not forfeited the

[26] See 400 F. Supp., at 767-771.

protection of the law.[27] Moreover, a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a defense to a violation of the Sherman Act.[28] Even though characterizing CBS as an oligopolist may be relevant to the question of remedy, and even though free competition might adversely affect the income of a good many composers and publishers, these considerations do not affect the legality of ASCAP's conduct.

More basically, ASCAP's underlying argument that CBS must be viewed as having acted with complete freedom in choosing the blanket license is not supported by the District Court's findings. The District Court did not find that CBS could cancel its blanket license "tomorrow" and continue to use music in its programming and compete with the other networks. Nor did the District Court find that such a course was without any risk or expense. Rather, the District Court's finding was that within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts.[29] In other words, although the barriers to direct dealing by CBS as an alternative to paying for a blanket license are real and significant, they are not insurmountable.

Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment,

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[27] See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 138-140; *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 16-17; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 214.

[28] See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 689-690.

[29] See 400 F. Supp., at 762-765.

confirm the illegality of its conduct. Neither CBS nor any other user has been willing to assume the costs and risks associated with an attempt to purchase music on a competitive basis. The fact that an attempt by CBS to break down the ASCAP monopoly might well succeed does not preclude the conclusion that smaller and less powerful buyers are totally foreclosed from a competitive market.[30] Despite its size, CBS itself may not obtain music on a competitive basis without incurring unprecedented costs and risks. The fear of unpredictable consequences, coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibits any CBS management decision to embark on a competitive crusade. Even if ASCAP offered CBS a special bargain to forestall any such crusade, that special arrangement would not cure the market-wide restraint.

Whatever management decision CBS should or might have made, it is perfectly clear that the question whether competition in the market has been unduly restrained is not one that any single company's management is authorized to answer. It is often the case that an arrangement among competitors will not serve to eliminate competition forever, but only to delay its appearance or to increase the costs of new entry. That may well be the state of this market. Even without judicial intervention, the ASCAP

[30] For an individual user, the transaction costs involved in direct dealing with individual copyright holders may well be prohibitively high, at least in the absence of any broker or agency routinely handling such requests. Moreover, the District Court found that writers and publishers support and prefer the ASCAP system to direct dealing. *Id.*, at 767. While their apprehension at direct dealing with CBS could be overcome, the District Court found, by CBS's market power and the importance of television exposure, a similar conclusion is far less likely with respect to other users.

monopoly might eventually be broken by CBS, if the benefits of doing so outweigh the significant costs and risks involved in commencing direct dealing.[31] But that hardly means that the blanket-licensing policy at issue here is lawful. An arrangement that produces market-wide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy. History suggests, however, that these restraints have an enduring character.

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[31] The risks involved in such a venture appear to be substantial. One significant risk, which may be traced directly to ASCAP and its members, relates to music "in the can"—music which has been performed on shows and movies already in the network's inventory, but for which the network must still secure performing rights. The networks accumulate substantial inventories of shows "in the can." And, as the Government has pointed out as *amicus curiae:*

"If they [the networks and television stations] were to discontinue the blanket license, they then would be required to obtain performance rights for these already-produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' It would produce, in other words, a case of bilateral monopoly. Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music 'in the can' to allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable." Brief for United States as *Amicus Curiae* 24-25.

This analysis is in no sense inconsistent with the findings of the District Court. The District Court did reject CBS's coercion argument as to music "in the can." But as the Government again points out, the District Court's findings were addressed essentially to a tie-in claim; "the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS' dropping the blanket license sufficiently high that ASCAP and BMI could take this 'termination penalty' into account in setting fees for the blanket license." *Id.*, at 25 n. 23.

Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. The record in this case plainly discloses that the limits have been exceeded and that ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders. Indeed, ASCAP itself argues that its blanket license constitutes a product that is significantly different from the sum of its component parts. I agree with that premise, but I conclude that the aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

APPENDIX D

INITIAL OPINION OF THE COURT OF APPEALS

REPORTED AT 562 F.2d 130 (2d Cir. 1977)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

No. 24, Docket 75-7600

Argued October 14, 1976

Decided August 8, 1977

Alan J. Hruska, New York City (Robert K. Baker, J. Barclay Collins, II, Robert M. Sondak, Kenneth M. Kramer, Cravath, Swaine & Moore, and John D. Appel, New York City, of counsel), for plaintiff-appellant.

Amalya L. Kearse, New York City (George A. Davidson, Pamela R. Chepiga and Hughes, Hubbard & Reed, New York City, of counsel), for defendants-appellees, Broadcast Music, Inc., et al.

Jay H. Topkis, New York City (Allan L. Blumstein, Max Gitter, Richard Reimer, Paul, Weiss, Rifkind, Wharton & Garrison, Bernard Korman, New York City, of counsel), for defendants-appellees, American Society of Composers, Authors and Publishers, et al.

Before MOORE, ANDERSON and GURFEIN, *Circuit Judges.*

GURFEIN, *Circuit Judge*:

The subject-matter of this appeal has been painstakingly set forth with clarity in the opinion of the District Court (Honorable Morris E. Lasker, Judge), 400 F.Supp. 737 (S.D.N.Y. 1975), and we refrain from restating the details of the evidence adduced at trial. We refer to that opinion for the evidence supporting the findings.

Columbia Broadcasting System, Inc. ("CBS") is a national television network, of which there are two others, National Broadcasting Company ("NBC") and American Broadcasting Company ("ABC"). CBS has brought this antitrust action against the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and their members and affiliates.[1] These members and affiliates are writers and publishers of musical compositions.[2] ASCAP and BMI license the non-dramatic performance rights in their compositions.[3]

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1. The references hereafter to ASCAP or appellant shall be taken to include BMI, unless the context clearly indicates otherwise. CBS was one of the founders of BMI in 1939. It gave up its stock interest in BMI in 1959, as have the other two networks. BMI in [*sic*] still owned by individual broadcasters. CBS is the parent of CTN, the Columbia Television Network.

2. "Writers" is a generic term which describes both those who supply the music, the composers, and those who supply the lyrics, the authors. *See Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322, 326 n.5 (S.D.N.Y. 1959).

3. These non-dramatic rights are called the "small" rights of musical compositions as opposed to the "grand" or dramatic rights. For a discussion of the distinction between these terms, *see 2 Nimmer on Copyright* §125.6 (1976). For our purposes it is enough to note that while ASCAP could normally license the performance of a song from, for example, *My Fair Lady*, it could not license the

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ASCAP and BMI issue blanket licenses for the right to perform any or all of the compositions in their repertories over the CBS network in exchange for a *negotiated* fixed annual fee. CBS contends that this method of licensing violates §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and constitutes copyright misuse.[4] CBS sought an injunction under §16 of the Clayton Act, 15 U.S.C. §26, directing ASCAP and BMI to offer CBS performing rights licenses on terms which reflect the actual use of music by CBS, or, alternatively, enjoining them from offering blanket licenses to any television network. CBS also sought a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202. The District Court, after a trial without a jury on liability alone, dismissed the complaint, and CBS appeals.

In dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*. Analogy may be sought in each field, but the practical complexities of licensing musical

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song in the context of a performance in whole or part of the play itself. Apparently, most uses of a musical composition by broadcasters, nightclubs and restaurants would be considered non-dramatic and therefore subject to license by ASCAP. Throughout this opinion references to "performing rights" refer only to performing rights for profit in non-dramatic performances.

4. Sections 1 and 2 of the Sherman Act state in relevant part:

"§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

"§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

non-dramatic performing rights can find no precise analogy anywhere. In the case of ordinary products, persons who use them without paying for them are generally thieves. In the case of infringement of performing rights in musical compositions, the infringement can be wholly innocent or due to the pressure and difficulty of obtaining timely clearance by individual license. This infringement aspect, unknown elsewhere, except to some extent in the field of patents, makes the music industry *sui generis*.

I

A summary history of ASCAP's difficulties with the antitrust laws will enable us to focus on the limited but difficult questions presented on this appeal.

In 1934 the Department of Justice filed suit against ASCAP seeking its dissolution and charging, *inter alia*, that through its pooling of individual copyrights ASCAP had the power to, and did, dominate the radio broadcasting industry.[5] However, after two weeks of trial, the Government received a continuance and the case remained dormant thereafter.

In 1941 the Government sued ASCAP and BMI as unlawful combinations on the principal ground that the annual blanket license (which was the *only* license then offered by ASCAP and BMI) was in restraint of trade. The complaint also charged that arbitrary prices were being ob-

5. *United States* v. *ASCAP*, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934). *See* Note, "Musical Monopolies and Legislative Control," 53 Harv. L. Rev. 458, 459 (1940); Note, "Anti-ASCAP Legislation and Its Judicial Interpretation, 9 Geo. Wash. L. Rev. 713, 720 (1941).

tained for the blanket licenses by the illegal pooling of copyrights. The Government sought an order enjoining, *inter alia,* ASCAP's *exclusive* licensing and requiring a form of *per use* licensing.

A consent decree resulted in 1941 by the terms of which ASCAP could no longer assert the *exclusive* right to license performing rights and could no longer interfere with *individual* licensing by its members. But the latter provision was itself illusory, because if the member licensed performing rights in his own copyright, he nevertheless had to pay the royalties derived therefrom into the ASCAP pot, thus affording little incentive for licensing by the individual member.[6]

Soon after the 1941 consent decree, ASCAP was sued by two hundred motion picture theatre owners for violation of Sections 1 and 2 of the Sherman Act. The problem was special to the theatre exhibition industry which was required at that time to take an ASCAP blanket performance license in order to exhibit motion pictures, the synchronized music of which had *already* been licensed to the motion picture producer. The specific holding by Judge Leibell in *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F.Supp. 888 (S.D.N.Y. 1948), was that it was unlawful for ASCAP to require the motion picture producer to contract with distributors that the film would be shown only in theatres having an ASCAP *performance* license. In broader terms, the decision held that ASCAP was a combination in restraint of trade be-

6. *See* Section 11 (I) of the 1941 Decree, *United States* v. *ASCAP,* 1940-43 CCH Trade Cases ¶56,104 at 403 (S.D.N.Y. 1941); Timberg, "The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950," 19 Law & Contemp. Prob. 294, 320 (1954).

cause the members had transferred all their non-dramatic performing rights to ASCAP and were barred from individually assigning such rights to motion picture producers. 80 F.Supp. at 894. *See also M. Witmark & Sons* v. *Jensen*, 80 F.Supp. 843, 849 (D.Minn.1948).[7]

At about this time, the Government began to renegotiate the consent decree with ASCAP. The amended consent decree reflected two important changes. First, ASCAP, unlike its position under the 1941 decree, was no longer permitted to interfere with the right of any of its members to issue a direct license to a user. The royalty so obtained did not have to go into the ASCAP pot for later distribution on some formula basis. Second, although ASCAP was still not required to issue per use licenses for broadcasters, it was required to issue per program licenses and not to discriminate against their free selection by licensees.[8]

The per program license is simply another form of blanket license. Both it and the "annual" blanket license permit use of any composition in the ASCAP inventory, and both permit payment by a fixed percentage of advertising revenues or a "flat" fee. The difference is that under the annual blanket license, the payment remains the same for the year regardless of whether all or none of the network's programs use ASCAP compositions, while under the per program license the fee is determined by the number of programs using ASCAP compositions. However, neither permits the licensee to pay only for those composi-

7. The *Alden-Rochelle* decision, *supra*, dealt only with performing rights in motion picture theatres.

8. *See United States* v. *ASCAP*, 1950-51 CCH Trade Cases ¶62,595 at 63,753-754 (S.D.N.Y. 1950).

tions which it actually uses, and the per program license should not be confused with a per use license.[9]

In strengthening the per program alternative, the amended decree prohibits ASCAP from requiring or influencing the licensee to negotiate for an annual blanket license before negotiating for a per program blanket license, and prohibits discrimination against its use by price differentials. If the licensee and ASCAP cannot agree upon a fee, the matter is left to the District Court to determine a "reasonable fee." And a prospective licensee is theoretically free to negotiate for non-exclusive performance rights with any ASCAP member, without interference by ASCAP. But ASCAP is presently not free to negotiate for licenses for the performance of particular music without the specific consent of the ASCAP member.

Though CBS acquiesced in this arrangement for many years, it decided, some years ago, that it was being denied the right to pay only for the music it uses. It could not, by itself, attempt to amend the decree. Instead, it brought this action, as it was entitled to do.[10] In the meantime,

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9. Under the per program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same.

The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming. In any case, we understand that all three networks and virtually all commercial television stations in the United States hold "annual" blanket licenses.

Under a per use license, on the contrary, the user would pay only for those compositions actually used during the program.

10. *See Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689-90, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961); *United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117, 124 (2d Cir.), *cert. denied*, 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed.2d 1048 (1964).

NBC and ABC, while they may have other grievances, have not joined in this attack on blanket licensing to the networks.[11]

II

CBS contends that the blanket licensing method is not only an illegal tie-in or block-booking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a per se violation of Sherman Act §1 in restraint of trade.

Judge Lasker, treating the case essentially as a tie-in or block-booking case which required proof of coercion to establish illegality, held that the provision of the consent decree allowing direct licensing for use by the individual copyright owners saved the scheme from being coercive and, hence, illegal. He found that the right of CBS to negotiate with individual copyright owners was not impractical, even if the blanket licensing system were not enjoined, but rather that the evidence indicated that if CBS chose to do so, it could obtain the performing rights it needed for use in a direct negotiation market without having to take a blanket license from ASCAP.[12] On that

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11. We note, however, that both ABC and NBC have specifically retained the right to transfer to a per use license from a blanket license, but only in the event that CBS receives a per use license from ASCAP.

12. Judge Lasker had the benefit of the expert testimony of three distinguished economists, Franklin M. Fisher for CBS, Robert Nathan for ASCAP and Peter O. Steiner for BMI. The experts disagreed sharply on the likely future action of a direct negotiation market. Judge Lasker essentially accepted the Nathan view. He found that the market forces would tend to create a licensing

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basis, as well as on his conclusion that there was no unlawful price-fixing, he dismissed the complaint.

Without commenting in detail on the evidence contained in the twenty-four volumes of the Appendix, we note that there was conflicting testimony by witnesses from the music industry and by expert economists on each side. We recognize that not all network needs for music would encounter the same difficulty in procurement. Thus, theme or background music is often original music created by a composer on a salary basis for a packager of the program or for the network. In such case, individual negotiation for the performing rights would not be difficult. Where the theme or background music has already been published, the name of the publisher is easily available. In the case of "feature" performances on variety shows, the obtaining of performance rights does involve some uncertainty. Situations may indeed arise where the writer's consent is required and would be hard to get. However, even in this area CBS could require the outside packager or producer to obtain the performance rights when he obtains the synchronization rights.[13]

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agency similar to the Harry Fox Agency which handles synchronization rights. There was testimony that it would take probably six months to a year after CBS' announcement of its intention to go to direct licensing for a viable market to emerge and that, in the meantime, there would be some disinclination to deal with CBS with some attendant confusion. Mr. Nathan frankly conceded, however, that there is no actual evidence of the characteristics of a direct negotiation market in these circumstances, for it has never been tried.

13. The writer generally assigns the right to license performing rights to the music publishers. Under the American Guild of Authors and Composers form contract, publishers are required to obtain an AGAC writer's consent for television synchronization

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The conflicting predictions at the trial obviously involved psychological as well as economic factors, and the economic theory presented was an amalgam of the two. Prophesying the future is one of the less satisfactory tools of the judicial process. Suffice it to say that our review leads us to the conclusion that the essential finding of the District Court that such a market can exist is not clearly erroneous.[14]

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licenses for songs over ten years old, and motion picture synchronization licenses for vocal use of a composition. The District Court, based on the testimony, found that "[t]here is every reason to believe that most writers would either give their publishers blanket consent for performance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch rights." 400 F.Supp. at 761. The upshot is that, as a practical matter, the networks would generally deal with publishers or through brokers or agencies of the publishers, rather than composers. *See* 400 F.Supp. 760-62.

14. CBS also calls attention to one historical situation and to one current situation in support of its thesis that a direct negotiation market will not work. It contends that when Minnesota Mining and Manufacturing Company tried to negotiate individual licenses for performing rights on an experimental background music project, it allegedly met with frustration. The District Court found, however, that CBS' allegations concerning that situation were overstated and, in any case, did not support CBS' contentions here, 400 F.Supp. at 771-75. Its finding is not clearly erroneous.

CBS also raises a subsidiary problem dealing with "music in the can." Each network now has a large inventory of recorded programs and motion picture films containing music for which it has synchronization rights but no performing rights other than those afforded by the ASCAP blanket license. CBS contends that since it lacks performing rights the copyright proprietor would have an enormous leverage to exact a premium, because, in the absence of a blanket license, appellant could not telecast the motion picture without the music owner's consent. There is a good deal of speculation in the record on what would happen to the amount of royalty for "music in the can" in various hypothetical situations, including testimony that CBS is so powerful a buyer that publishers could not afford to get into its bad graces. This is a question of fact and the

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While this finding of the District Court that there is indeed a viable alternative to the blanket license disposes of the charge that the blanket license involves an illegal tie-in or block-booking, *see, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); 17 U.Chi.L.Rev. 183 (1949); Timberg, *supra* note 6 at 300, it does not resolve the charge of restraint of trade by the fixing of prices.

The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable,* the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.[15] His dis-

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District Court found that "CBS has not proven that its fears of a 'holdup' by copyright proprietors are justified." 400 F.Supp. at 776. In any event, it is hard to see how "music in the can" problems will be solved by an injunction against blanket licensing. The individual licenses would still have to be negotiated with some of the same economic problems involved.

15. ASCAP distributes about $1,000 ($400-$500 to the publisher or publishers; $400-$500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses). The royalty is fixed by ASCAP and not by the licensee.

Paragraph XI of the 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to

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tributive share of the common royalties may be greater than the royalty he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a "combination which tampers with price structures [and therefore] engage[s] in an unlawful activity." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940).[16]

There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition, and Judge Lasker found that musical compositions, though not fungible, do fall into classes, so that one composition in a particular class may serve the network as well as another in the same class. 400 F.Supp. at 751-52. There is, moreover, some analogy to the patent pooling cases which broadly hold that the pooling of competing, and perhaps even non-competing, patents is illegal. *See United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Line Mate-*

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the performance of the compositions . . .." Under the 1960 amendment, writers also have the option of receiving royalties under a plan which compensates them additionally for length of membership and the recognized status of their works. *See* 1960 Consent Decree, Section III(A) and Part I of Attachment A, *United States* v. *ASCAP*, 1960 CCH Trade Cases ¶69,612 at 76,469-470 (S.D.N.Y. 1960).

16. And, of course, it has long been held that the fact that "the object of sale is the creation or product of a man's ingenuity does not alter this principle." *Associated Press* v. *United States*, 326 U.S. 1, 15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013 (1945). *See Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

rial Co., 333 U.S. 287, 68 S.Ct. 550, 92 L.Ed. 701 (1948).[17] While these cases involved resale price-maintenance agreements, the broad language of the opinions treated the patent pooling agreement as itself unlawful.[18]

Price-fixing, as we have been instructed, is generally unlawful per se. *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 221, 223, 60 S.Ct. 811; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). Yet it may be that in some circumstances market requirements would require the acceptance of some form of price-fixing. In fact, both the plaintiff here, CBS, and the Department of Justice, which is charged with enforcing the Sherman Act, recognize in the case of ASCAP blanket licenses what CBS has termed the "Per Se Rule with a Market-Functioning Exception." In short this concept holds that price-fixing is per se illegal except where it is absolutely necessary for the market to function at all.

The question was addressed by the Government in the case of *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968). That was an action for copyright infringement brought by several ASCAP members against a radio broadcaster operating in the state of Washington. The broadcaster defended in part on the assertion that ASCAP's price-fixing as well as its commission of other

17. Hence, on the surface, the pool of copyrights may be analogized to a pool of competing patents.

18. *See United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 377, 380, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Line Material Co.*, 333 U.S. 287, 308, 68 S.Ct. 550, 561, 92 L.Ed. 701 (1948) (illegal "whether it is a price agreement between *producers for sale* or between producer and distributor for resale") (emphasis added).

antitrust violations constituted copyright misuse. It also counterclaimed for treble damages and injunctive relief. The District Court held that the copyrights were infringed and that the defense and counterclaims were insufficient. The Ninth Circuit, in affirming, rejected the antitrust defense.

In *K-91* the parties recognized that there was a market need for blanket licensing for the single radio station there involved; indeed, they had stipulated that "[i]t would be commercially, practicably and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations."[19]

On the petition for certiorari in an amicus brief, the Solicitor General, in approving the result reached by the Ninth Circuit, stated:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *United States* v. *St. Louis Terminal*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933); *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). This case appears to

19. The stipulation is quoted in Judge Lasker's opinion below on ASCAP's motion for summary judgment. *Columbia Broadcasting System, Inc.* v. *ASCAP*, 337 F.Supp. 394, 400 (S.D.N.Y. 1972).

> us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.
>
> "If this market is to function at all, there must be —at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them."[20]

The Solicitor General recognized that for some broadcasters direct licensing might be possible and more desirable, and that technological changes, such as in computer technology, might eliminate the need for the blanket license. He found, however, that market necessity may justify "bulk licensing of recorded music" where no "practical alternatives exist"[21] and concluded that on the record in that radio-broadcasting case the ASCAP blanket license to the radio station did not violate the antitrust laws.

This "market necessity" concept, as a very limited and narrow exception to the per se rule against price-fixing, is not without merit. It would seem reasonable to conclude that Section 1 of the Sherman Act, which prohibits combinations in restraint of trade, should be construed so as not

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20. Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari in the Supreme Court of the United States, *K-91, Inc.* v. *Gershwin Publishing Corp.*, No. 147, dated December, 1967 at 10-11 ("Amicus Brief").

21. *Id.* at 13.

to prohibit the very trade it was intended to protect.[22] We do not quarrel, therefore, with the *result* reached by the Ninth Circuit in *K-91*.

In this case, by contrast, Judge Lasker found that, with respect to the television networks, a "practical alternative" —the free direct negotiation market—can exist *even beside* the blanket license. It would seem to follow *a fortiori* that the direct negotiating market can surely exist if the blanket license is eliminated.

The dilemma here is that if the blanket licensing system is viewed as block-booking, the *availability* of a direct negotiating market does save it from being "coercive." On the other hand, if the blanket licensing system is held to be price-fixing in restraint of trade, the very availability of a direct negotiating market would tend to make the blanket license less of a "market necessity." Curiously, though appellant now focuses its principal attack on the blanket license as a price-fixing device, it was appellant which throughout the trial tendered proof upon proof that a direct negotiating market posed *severe* practical problems. If that is true, such proof tends to demonstrate a *need* for the availability of an alternative blanket license. On the other hand, it was ASCAP which attempted to prove that a direct negotiating market can be made to exist even in competition with the blanket license. This raises the question, paradoxically, whether if that be true, the blanket license can nonetheless continue to be regarded as a market *necessity*. Thus, if we pose the issue as tie-in or block-booking, the

22. The narrowness of the exception is emphasized by the circumstance that it is difficult even to imagine another industry where such a "market necessity" defense would be applicable.

absence of coercion supports the view of the District Court if we accept its finding that a direct negotiating market is feasible. On the other hand, if we pose the issue as restraint of trade through price-fixing, the very finding that a direct negotiating market is feasible tends to undermine the need for the blanket license as a market *necessity*.

Several arguments have been advanced to refute the contention that the blanket license is itself a price-fixing mechanism in restraint of trade. The District Court met the price-fixing argument by suggesting that price-fixing has been sustained in patent cases in the absence of coercion. It cited *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), and *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950), for the proposition that "the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor." 400 F.Supp. at 749. The *Hazeltine* cases did not involve a restraint of trade by price-fixing, however, for these were cases in which a single trader, Hazeltine, owned and licensed all the patents involved. Coercion is simply not an essential ingredient of price-fixing. *Cf. United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 225 n.59, 60 S.Ct. 811.

Another price-fixing defense asserted by ASCAP and accepted by the Ninth Circuit in *K-91* is that the consent decree insulated ASCAP against the restraint of trade charge on the ground that the price of the blanket license was "reasonable," since resort to the District Court was available to determine "reasonableness." That a price fixed by the agreement of competitors is "reasonable" is

not a defense, however.[23] Nor do we think that the determination of the "reasonableness" of the price by a *court* saves the price that has been fixed by a combination from continuing to be an unlawful device in restraint of trade, absent the justification of market necessity. In the *K-91* situation, the resort to judicial supervision was adequate for the simple reason that there was no other solution possible. The provision in the consent decree for resort to the District Court if there is a dispute on the reasonableness of the blanket license fee was highly desirable in the *K-91* situation, because there it represented a threatening veto to gross overreaching. On the other hand, when a competitive market *is* available, as the District Court found to be the case here, the determination of price by a judge can hardly be the equivalent of a price determined by a competitive market. For a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces.

Nor is ASCAP "disinfected" by the Government consent decree, see *K-91, supra* at 4; such a decree does not "constitut[e] an implied partial repeal of the antitrust

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23. *Cf. United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-97, 47 S.Ct. 377, 71 L.Ed. 700 (1927). We also note that the costs of litigating the issue of what is a "reasonable" fee in the Southern District of New York would discourage some users from taking advantage of this provision in the decree. In fact, in the 27-year existence of the provision, the consent-decree judge has never had to fix a "reasonable" fee for an ASCAP blanket license.

Finally, we note that this defense would not be available to BMI because its consent decree has no provision providing recourse to the District Court to determine a "reasonable" fee in cases of disagreement between the parties.

laws." 337 F.Supp. at 399-400. A consent decree has no such potency. Non-parties who did not participate in the settlement, and who are affected by ASCAP's activities may challenge them under the antitrust laws. *See Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 689-90, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961); *United States* v. *ASCAP* (*Shenandoah Valley Broadcasting, Inc.*), 331 F.2d 117, 124 (2d Cir.), *cert. denied,* 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed. 2d 1048 (1964).

As the Supreme Court has noted, subsequent to the *K-91* decision, a consent decree, as it affects the parties themselves, is simply a compromise based on many factors. *United States* v. *Armour & Co.,* 402 U.S. 673, 681-82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). In historical fact, the government lawyer who negotiated the 1950 decree has stated that the "District Judge who entered the judgment, in conformity with the prevailing practice, gave no indication as to the legality or illegality of ASCAP's past organization or contemplated reorganization, or of its old or new practices." *Timberg, supra* note 6, at 295 n.2. And more recently, as the Solicitor General noted in his amicus brief in *K-91*: "[p]rivate parties, of course, always have the option of seeking relief in their own behalf, notwithstanding any consent decree accepted by the government."[24] The Government consent decree does not insulate ASCAP from the claims of private plaintiffs.[25]

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24. *See* Amicus Brief, *supra* note 20 at 14.

25. We do not imply that a government consent decree should be given no weight at all, especially since the Department of Justice has the responsibility for enforcing the Sherman Act. But it is not even clear that the problems presented in this action are coeval with those which surfaced almost 30 years ago when this decree was negotiated. We have had a more recent indication of the government's views, moreover, in its amicus brief in *K-91.*

Finally, ASCAP argues, as its basic premise, that the blanket license of the performance rights in *all* the copyrights in the Society's basket is so different from the performing right in each separate copyright that the claim of trade restraint by price-fixing is precluded. It urges that the collective activity necessary for the blanket license does not amount to price-fixing of the individual performing rights since the network can still bargain for such individual performing rights with each copyright owner separately. The argument that if one does not want the blanket license he need not take it is plausible. Yet the very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete. "[T]he fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act." *See Associated Press* v. *United States*, 326 U.S. 1, 17, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945).

ASCAP analogizes a blanket license to a symphony orchestra, in which the ensemble is different from the individual musicians and which may therefore lawfully command a price which is different and higher than the price for each musician's performance. The fallacy is that when the orchestra plays as an ensemble it represents the only product of its kind. Here each composer, by contrast, records his own solo for separate broadcast. The musicians in an orchestra are not competitors; the con-

tributors of copyrights for the blanket license in many situations are, and it is their price competition among themselves that is affected by the blanket license.

We therefore conclude that the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a "market necessity" defense. It therefore constitutes a violation of §1 of the Sherman Act. We accordingly reverse the District Court's dismissal of the complaint.[26]

III

The trial below was on liability alone, and in view of the dismissal of the complaint no separate evidence was taken on remedy. In reversing the dismissal of the complaint we do not fashion the remedy. We think it useful, however, to offer some guidelines to the District Court in its selection of remedies.

Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing—in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all

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26. In not reaching the same result as the Ninth Circuit did in *K-91*, we, in no way, intimate that we would have held the blanket license to the single radio station to be unlawful, or that the blanket licenses given by ASCAP generally are unlawful. The *K-91* result was, in our view, entirely justifiable as an example of market necessity. Indeed, CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations.

circumstances.[27] The blanket license is not simply a "naked restraint" ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others.

Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing.[28]

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27. We recognize that CBS contends that a blanket licensing system overhanging the market in any combination of circumstances will necessarily affect the price for each set of individual performing rights. On this record we are not convinced that this is necessarily so. And the District Court found the contrary.

CBS has asserted that an individual member of ASCAP, thrown into a direct negotiating market for the first time, will tend to measure the royalty he asks for a particular performing right by the royalty he has actually been receiving from ASCAP as his share under the blanket license. Considering the counterforce of the strong bargaining power of CBS, we cannot accept this as more than a theoretical assumption. Until some alternative method has actually been allowed to function for some time, contemporaneously with the blanket license, no man can say for certain that CBS' fears will prove inevitably to be true.

28. On remand, we think it would be appropriate for the District Court to invite the Department of Justice to participate or express its view on the appropriate remedy.

We also emphasize that in the foregoing discussion of remedy, "ASCAP" also includes appellant BMI. *See* note 1, *supra*.

We reverse the judgment dismissing the complaint and remand to the District Court for further proceedings in accordance herewith.[29] If the District Court considers it appropriate, it may fashion interim relief as well. No costs.

MOORE, *Circuit Judge* (concurring):

I concur in the majority's conclusion to remand for further proceedings so that such proof and argument as may be required, may be presented as will enable the court, and hopefully the parties as well, to evolve a practical method of adding to ASCAP's repertory per use licensing. Since future proceedings will be directed to that issue, my points of disagreement will not even rise to the status of that legal vacuity known as "dicta". However, I do not agree that "the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a 'market necessity' defense."

Market necessity is recognized by the majority as "not without merit" and certainly *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968), and the Solicitor General's accompanying amicus brief would support this view.

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29. As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and "bypass" of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record.

We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim.

APPENDIX E

OPINION OF THE DISTRICT COURT

REPORTED AT 400 F. SUPP. 737 (S.D.N.Y. 1975)

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants.

No. 69 Civ. 5740

Filed September 22, 1975

LASKER, District Judge.

In this age of change the quality of life has been fundamentally altered and influenced by the development of the automobile, the computer and television.

Millions of viewers spend untold hours weekly viewing television. During the larger part of that time the viewer is a listener to programs which utilize music, whether as background, as theme or as a feature. This case relates to the method by which networks are licensed to use copyrighted music on television.

The Columbia Broadcasting System (CBS)[1] brings this antitrust action against the American Society of Compos-

1. CBS is engaged in a number of businesses, only one of which is the operation of the CBS television network (CTN). Although the parties distinguish between CBS and CTN in their post-trial submissions, for the sake of clarity we refer throughout this opinion to both the parent corporation and the network as "CBS."

ers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI)and their members and affiliates.[2] It complains that the present system by which ASCAP and BMI issue blanket licenses for the right to perform any or all of the compositions in their repertories over the CBS network in exchange for a flat annual fee violates the Sherman Act, 15 U.S.C. §§1 and 2. The complaint seeks an injunction under §16 of the Clayton Act, 15 U.S.C. §26, directing ASCAP and BMI to offer CBS performance right licenses on terms which reflect the nature and amount of CBS' actual use of music, or in the alternative, enjoining them from offering blanket licenses to any television network. CBS also seeks a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202.

I.

Introduction

A. The Parties

Prior to ASCAP's formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses. On

2. The other named defendants are certain members of ASCAP, as representative of the class of ASCAP's members; and certain BMI affiliates, as representative of the class of BMI affiliates. The case has heretofore been declared a class action against both classes.

the other side of the coin, those who wished to perform compositions without infringing the copyright were, as a practical matter, unable to obtain licenses from the owners of the works they wished to perform. ASCAP was organized as a "clearing-house" for copyright owners and users to solve these problems. The world of music has changed radically since 1914. Radio and television broadcasters are the largest users of music today; they "perform" copyrighted music before audiences of millions. In 1975 ASCAP and BMI licensed these large users, including CBS and the other networks as well as smaller ones such as concert halls and background music services.

Because of the multitude of performances of music they generate each year, virtually all radio stations and television networks secure the rights to perform the music they use by a "blanket" license. An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is "automatically" covered by the blanket license.

ASCAP's current membership includes some 6,000 music publishing companies and 16,000 composers. Its members have granted ASCAP, as their licensing agent, the non-

exclusive right to license users to perform the compositions owned by them. ASCAP provides its members with a wide range of services. It maintains a surveillance system of radio and television broadcasts to detect unlicensed uses, institutes infringement actions, collects revenues from licensees and distributes royalties to copyright owners in accordance with a schedule which reflects the nature and amount of the use of their music and other factors.

BMI, a non-profit corporation, was organized in 1939 by members of the radio broadcasting industry, including CBS. It is affiliated with approximately 10,000 publishing companies and 20,000 writers and functions in essentially the same manner as ASCAP. Although CBS sold back its BMI stock to the corporation in 1959, BMI is still owned entirely by broadcasters.

As a practical matter virtually every domestic copyrighted composition is in the repertory of either ASCAP, which has over three million compositions in its pool, or BMI, which has over one million. Like ASCAP, BMI offers blanket licenses to broadcasters for unlimited use of the music owned by its "affiliates." Almost all broadcasters hold blanket licenses from both ASCAP and BMI.

As is generally known, CBS operates one of three national television networks, as well as AM and FM radio stations in seven major cities. It has held blanket licenses from ASCAP for its radio broadcast operations since 1928, and from BMI since soon after that organization was founded in 1939. It has held ASCAP and BMI blanket licenses for its television network on a continuous basis since the late 1940's.

CBS supplies television programs to approximately two hundred affiliated television stations throughout the country, and telecasts about 7,500 programs per year. Many of these programs make use of copyrighted music which is recorded on the soundtrack. However, CBS does not produce most of the programs seen on its network. Instead it purchases the right to broadcast programs produced by independent television production companies, known as "program packagers." Most of the popular prime-time serials fall into this category. In addition CBS itself produces a television serial ("Gunsmoke"), two day-time serials, a number of "specials," usually variety shows, as well as news, public affairs and sports programs.

Agreements between program packagers and CBS normally stipulate the price at which the packager will produce a program in a series and furnish it to CBS for broadcast. Pursuant to the agreements, packagers are responsible for obtaining and furnishing to CBS most rights necessary for the use of copyrighted music by the network, such as the right to record a copyrighted song in synchronization with the film or video tape ("synch" rights). However, program packagers do not, in the present scheme of things, furnish to CBS the right to *perform* the copyrighted music for profit as part of a television broadcast. Ever since television became commercially practicable in the late 1940's, CBS has obtained such "performance" rights for packaged programs, as well as for the programs it produces itself, from ASCAP and BMI by purchasing blanket licenses. From time to time it has renewed its licenses after negotiations with ASCAP and BMI. In the history of the parties the fee for the blanket license has been ex-

pressed in terms of a percentage of CBS' advertising revenues. For example, for many years prior to the institution of suit, the BMI blanket license fee remained at 1.09% of net receipts from sponsors after certain deductions. This resulted in payment to BMI of about $1.6 million in 1969. For access to ASCAP's considerably larger repertory, CBS paid about $5.7 million in 1969. Averaging the total of $7.3 million paid by CBS in that year over 7,500 programs, its cost for ASCAP or BMI music runs about $1,000. per program. Of course, as detailed later, many of CBS' programs, such as news and public affairs shows, use no music at all; while others, such as variety shows, use a great deal. $1,000. is a small fraction of the total cost of the program. CBS pays about $200,000. for each episode of a one hour variety show or dramatic serial, and as much as $750,000. for a made-for-TV movie. Since the commencement of this action, CBS has held interim blanket licenses from ASCAP and BMI at a total annual cost of some $6 million.

B. The Consent Decrees

Neither ASCAP nor BMI is a stranger to antitrust litigation. In 1941 the government sued ASCAP for antitrust violations. The action resulted in a consent decree which largely governs ASCAP's relationships with licensees such as CBS and other users. As amended in 1950, the decree requires ASCAP to offer a "per program" license to broadcasters in addition to the blanket license it has traditionally offered. Both forms of license grant the right to use any or all of the works in ASCAP's repertory. However, the blanket license allows use of the entire in-

ventory for a designated period of time, usually a year, for which the user pays a flat fee, while the per program license permits use of the entire repertory but requires payment only with respect to programs which actually make use of copyrighted music. The 1950 decree mandatorily enjoins ASCAP to set its fees for these licenses in a manner which gives the user a genuine choice between them, and prohibits it from requiring or influencing the prospective licensee to negotiate for a blanket license before negotiating for a per program license.[3] If ASCAP and the licensee

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3. The 1950 decree states in part that ASCAP is:

> (B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which
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> (1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,
>
> (2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and
>
> (3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs,

(footnote continued on next page)

are unable to agree on a fee, the latter may apply to the United States District Court for the Southern District of New York for determination of a "reasonable fee." In such proceedings, ASCAP bears the burden of establishing the reasonableness of the fee it requests.

Finally, ASCAP's licensing authority is not exclusive. The 1950 decree provides that music users may bypass

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with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-section (B) hereof, and to the final order or judgment entered by this Court in such proceeding . . .

ASCAP entirely, and negotiate for a license directly with the composer or publisher holding the copyright.[4]

Under the terms of a consent decree entered in 1966 in *United States* v. *BMI* (S.D.N.Y.), BMI is required to offer a per-program license in addition to a blanket license. The difference in the terms of these licenses must be justified by "applicable business factors."[5] Although the form of the BMI decree differs from that of the ASCAP decree,

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4. The Decree provides:

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user nonexclusive licenses for rights of public performance;

5. The BMI consent decree provides in part:

(B) Defendant shall, upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis, at defendant's option. The fee for this license shall relate only to programs (including announcements), or to programming periods, during which a licensed composition is performed. The fee shall be expressed, at defendant's option, either (1) in dollars, (2) as a percentage of the revenue which the broadcaster received for the use of its broadcasting facilities or (3) in the case of sustaining programs or programming periods, as a percentage of the applicable card rate had the program or programming period been commercially sponsored. In the event defendant offers to license broadcasters on bases in addition to a per program or per programming period basis, defendant shall act in good faith so that there shall be a relationship between such per program or such per programming period basis and such other bases, justifiable by applicable business factors including availability, so that there will be no frustration of the purpose of this section to afford broadcasters alternative bases of license compensation.

the parties have stipulated that CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members. (CX 3)

C. CBS' Complaint

CBS does not allege that ASCAP and BMI have violated the terms of the consent decrees. It claims, rather, that the licensing alternatives which the decrees specify are not flexible enough to meet its needs, and are not realistically available to it. Thus, CBS' complaint charges that the blanket license "compels" it to pay performance royalties with respect to television programs which use no music and that the per-program license requires it to pay the same royalty for a program which uses a single copyrighted composition as for one which uses many. (Complaint ¶¶14, 19). In other words, CBS asserts that defendants are "using the leverage inherent in [their] copyright pool to insist that plaintiff pay royalties on a basis which does not bear any relationship to the amount of music performed." (Complaint ¶19) As to the third alternative specified in the consent decrees—the possibility of bypassing ASCAP and BMI entirely and seeking licenses for the specific compositions it wishes to perform directly from the copyright proprietors—CBS alleges that any attempt by it "to acquire such a large body of rights from the [individual copyright proprietors] . . . would be wholly impracticable . . ." (¶15)

CBS' disenchantment with the blanket licensing system takes form in several legal claims: first, that the writer and publisher members of ASCAP and BMI have combined

through their common licensing organizations to eliminate price competition among themselves and, by pooling the grant of their respective licenses through ASCAP and BMI, to fix the price which a television network must pay to secure the rights; second, that ASCAP and BMI insist on granting only blanket licenses and have therefore imposed an unlawful tie-in, in that CBS is required to purchase the rights to music it does not want to buy in order to secure the rights to music it does want; third, that by forming pools of music and requiring CBS to deal with the common licensing agent of the pools, the writer and publisher members and affiliates of ASCAP and BMI are engaging in a concerted refusal to deal directly with CBS; fourth, that through ASCAP and BMI the writers and publishers are guilty of monopolization, both attempted and achieved; and fifth, that the activities described constitute copyright misuse.

Despite this rather imposing line-up of charges, the central issue in the case is not complex. The essence of CBS' claim is that ASCAP and BMI are illegal combinations whose purpose and effect is to exact royalties from CBS for music it does not wish to license. The validity of the claim turns on whether CBS is in fact compelled to take a blanket license from the licensing organizations in order to secure the performance rights it needs. ASCAP and BMI contend that CBS is not compelled to do so, but has, in common with the ABC and NBC television networks and virtually all radio broadcasters, found it most convenient to license music by the blanket method. Defendants argue that if CBS no longer wishes to secure performance rights

through centralized agents such as ASCAP and BMI, it can obtain the necessary rights directly from the individual members and affiliates of ASCAP and BMI by negotiating with them for performance rights to the particular compositions it wants. As defendants view the case, if CBS is to prevail it must prove that direct licensing with members of the alleged combination is an unfeasible alternative to the blanket license. Proof that licenses could not be obtained directly from copyright proprietors, despite the fact that ASCAP and BMI are required by consent decrees to permit their members and affiliates to license their compositions to users directly, would support the inference that defendants have formed illegal combinations in order to foreclose competition in the market for performance rights to music for network use. Conversely, proof that direct licensing is a feasible alternative method by which CBS could satisfy its music needs would undercut its claims that copyright proprietors have combined to monopolize the market for performance rights and have used their leverage to fix prices and impose unlawful tie-ins.

CBS vigorously disagrees with this view of the case. It argues, as though it could have moved for summary judgment years ago, that ASCAP and BMI are guilty of per se violations of the antitrust laws because the blanket licensing system, which is the only method by which CBS and the other networks have ever licensed performance rights, has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) CBS views the question of the feasibility of direct licensing as irrelevant to the issue

whether defendants have restrained trade. It argues that the sole questions to be determined are (1) whether defendants' restraint is justified or reasonable in view of the unique economic setting of the music licensing market; and (2) whether licensing can be accomplished on a more competitive basis. We find CBS' analysis unpersuasive. Nevertheless, we set forth our views on the questions CBS raises because of their central importance to the case. To do this, we must retrace some of the steps taken to define the issues prior to the trial.

II.

The Issue Presented for Decision

A. ASCAP's Motion for Summary Judgment

At an earlier stage in the litigation ASCAP moved for summary judgment, relying principally on the decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968). In *K-91* several members of ASCAP sued a radio broadcaster for infringement. The broadcaster admitted the infringement but defended on grounds similar to those asserted by CBS: that ASCAP is an unlawful combination engaged in price-fixing and block-booking of its members' compositions. In rejecting the claims, the Ninth Circuit observed that ASCAP does not fix prices because, under the 1950 consent decree, the United States District Court for the Southern District of New York is the ultimate price-fixing authority in the event of disagreement as to the reasonableness of ASCAP's fees. As to the other claims, the court observed:

> "No contention is made here that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree.
>
> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved [by the 1950 decree]." 372 F.2d at 4.

Although we agreed with the *K-91* court, and continue to agree, that the activities of ASCAP and BMI are not illegal per se, we denied ASCAP's motion for summary judgment because of a critical difference between the case presented in *K-91* and the one at hand. In *K-91* the parties stipulated that it would be virtually impossible for broadcasters and copyright proprietors to arrange separate licenses and payments for each radio performance of a copyrighted composition,[6] and no proposal was made to the court of a prac-

6. The United States adopted this position in its Memorandum of Amicus Curiae submitted in connection with the petition for writ of certiorari to the Supreme Court of the United States in *K-91*:

> . . . There are over 4,100 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann.Rep., pp. 106, 110 (1966)). Most of these stations broadcast recorded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to

(footnote continued on next page)

ticable alternative to blanket and per-program licenses. In contrast to *K-91*, CBS' claims are premised on the practicability of alternatives to the system now in effect. As noted earlier, CBS seeks an injunction either enjoining ASCAP and BMI even from offering blanket licenses or, in the alternative, and preferably, establishing what CBS calls a "per-use" system, by which ASCAP and BMI (rather than individual copyright owners) would be required to license individual compositions in accordance with a schedule of fees under court supervision.[7] Moreover, far

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exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished. (Memorandum at 9-10)

7. Under the "per-use" system proposed by CBS, it would continue to license its music through ASCAP and BMI, but in a substantially different way than it does under the blanket license. CBS would pay ASCAP or BMI a specified fee for each performance of a composition in the pool (the "per-use reservoir"), plus an administrative fee. The fee for each use would be fixed in a schedule reflecting the nature of the use (theme, background or feature use) and other appropriate factors such as duration of use, or the popularity of the composition. Thus, the fee schedule would likely provide different prices for otherwise comparable uses of particular compositions. If the fee schedule could not be fixed by agreement between CBS and defendants, it would be set by the court.

Each copyright proprietor would have the right to "withdraw" any of his works from the per-use reservoir on reasonable notice or at periodic intervals (e. g. quarterly). However, the right of withdrawal would not extend to spontaneous or other unplanned uses, nor to music which was filmed or taped prior to withdrawal even though the performance occurred after withdrawal. CBS and its producers would remain free to negotiate a license for a composition directly from the copyright proprietor regardless whether it is in the reservoir or has been withdrawn. The per-use rate schedule would be adjusted at periodic intervals to reflect prices negotiated in direct licensing transactions.

from being a stipulated fact, the impracticability of CBS' "bypassing" ASCAP and BMI to secure licenses directly from copyright proprietors is the key factual issue in the case. Accordingly, we held that the feasibility of less restrictive alternatives to the blanket licensing system presented a genuine issue as to a material fact in the case and denied summary judgment to ASCAP.

Subsequent to determination of ASCAP's motion and in accordance with our holding, we ordered trial of the following specified issues:

> "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;
>
> (ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

B. CBS' "Per Se" Contention

Despite our earlier holding that the activities of ASCAP and BMI are to be judged by the rule of reason and the specification of the issues to be tried in light of that holding, CBS now takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis. As noted earlier, it argues as to the first issue, that it has established an illegal restraint of trade as a matter of law because the blanket licensing arrangement has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) Coming after an eight week trial and the accumulation of

a bulky factual record, the timing of this contention is unusual. For the reasons stated below, we find it to be unmeritorious as well.

In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ("sellers") of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular "products" (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis.

The claim fails as a matter of law. In *Automatic Radio Co., Inc.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950), the parties entered into an agreement by which Automatic Radio acquired a license for a ten year term to incorporate into its products any or all of several hundred patents held by Hazeltine. Automatic Radio was not obligated to use any of the patents in the manufacture of its products, but agreed in any event to pay Hazeltine royalties based on a percentage of its total sales.

Automatic argued that the terms of the license constituted per se patent misuse and an illegal tying arrangement because the agreement exacted payment of a royalty on all sales whether or not its products used the patents, and in effect required it to purchase licenses for products for which it needed no license as well as for those which did. In rejecting the argument, the Court stated:

> "We cannot say that payment of royalties according to an agreed percentage of the licensee's sales is unreasonable. Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. We are not unmindful that convenience cannot justify an extension of the monoploy [*sic*] of the patent. But as we have already indicated, there is in this royalty provision no inherent extension of the monopoly of the patent. Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using existing patents plus any developments resulting from respondent's continuous research. We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." 339 U.S. at 834, 70 S.Ct. at 898 (citations omitted).

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) the Court

refined the standards by which the validity of package licenses are to be judged. At issue in that case was the propriety of an injunction entered by the district court enjoining Hazeltine from:

> "A. Conditioning directly or indirectly the grant of a license to . . . [Zenith] . . . under any domestic patent upon the taking of a license under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" 395 U.S. at 133-34, 89 S.Ct. at 1582 (emphasis in original).

The quoted provision was directed at Hazeltine's proven policy of *insisting* upon acceptance of its standard five-year package license agreement covering some 500 patents, and reserving royalties based on Zenith's total radio and television sales whether or not the licensed patents were actually used in the products manufactured. The Court of Appeals had stricken the last clause of the quoted paragraph, relying on *Automatic Radio* for the proposition that conditioning the license upon payment of royalties on unpatented products was not misuse of the patent. The Supreme Court disapproved this construction of its earlier decision. It distinguished between the situation presented in *Automatic Radio,* in which the parties *agreed* on a package license "as a convenient method designed by the parties to avoid determining whether each radio receiver embodied [a Hazeltine] patent," and the situation in *Zenith,* where the patent holder *compelled* the licensee to choose between a package license conditioned on the payment of royalties on unpatented products, or no license at

all. 395 U.S. at 135-37, 89 S.Ct. 1562.[8] In other words, the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor.

We disagree with CBS that such compulsion inheres in the present licensing system as regulated by the consent decrees and that defendants are therefore guilty of per se violations. As noted earlier, CBS makes no claim that either ASCAP or BMI has violated any provision of the consent decrees. The terms of the decrees do not by any construction suggest that CBS is in fact compelled to take a blanket license. To the contrary, ASCAP and BMI are required to offer per program licenses under which a fee is charged only with respect to programs in which a composition within the repertory has been performed; and to structure the fees for blanket and per program licenses so that the user has a genuine choice between them. Apart from the licenses available from ASCAP and BMI the decrees leave a music user free to obtain licenses directly from copyright owners. This factor alone markedly distinguishes the present case from *Zenith*, in which Hazel-

8. The Court amplified the distinction as follows:

> If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them" he cannot complain that he must pay royalties if he chooses to use none of them . . . But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent . . .
>
> We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales . . . 395 U.S. at 139, 89 S.Ct. at 1585.

time, as the sole supplier of the patents in issue, had, for all practical purposes, unlimited leverage in bargaining the terms of any license to them.

C. CBS' Theory of the Burden of Proof

Taking a different tack, CBS also argues that "it is clear that [ASCAP and BMI] insist on licensing exclusively on a blanket basis" and that because they insist on such an "inherently restrictive" method of sale, they have the burden of proving the availability in the market place of acceptable substitutes, i. e., that CBS could obtain direct licenses sufficient to meet its needs from copyright proprietors. (CBS Post-Trial Brief at 15, 26-27) Neither the facts nor the law support the argument. As outlined later in this opinion, the evidence does not establish that ASCAP and BMI insist or have ever insisted on licensing on a blanket basis; and, of course, if they did, they would flatly violate the terms of the consent decrees.

In any event, the argument fails as a matter of law. CBS cites a number of cases for the proposition that a defendant who argues that the plaintiff can avoid injury by obtaining a substitute product bears the burden of proving such an assertion. See, *TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, 462 F.2d 1256 (8th Cir. 1972); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 872, 27 L.Ed.2d 826 (1971); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied sub nom., Providence Fruit & Produce Bldg., Inc.* v. *Gamco, Inc.*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952); *Stanton* v. *Texaco, Inc.*, 289 F. Supp. 884 (D.R.I. 1968).

To secure injunctive relief in a private antitrust suit, the plaintiff must prove an actual violation of the antitrust laws or that such violation is impending and that as a result the plaintiff is threatened with loss or injury. *Zenith Radio Crop.* [*sic*] v. *Hazeltine Research, Inc., supra,* and *Credit Bureau Reports, Inc.* v. *Retail Credit Co.,* 476 F.2d 989 (5th Cir. 1973). In the cases on which CBS relies, the plaintiff had indisputably established the first element, i.e., that the defendant had illegally denied him something he wished to purchase, for example, space in a fruit market, access to telephone poles for a cable TV installation, or an aircraft dealership. The defendant in those cases argued that the plaintiff had failed to establish the second element of its claim—injury or the threat of injury—because he had not proven that he could not avoid injury simply by purchasing a substitute product elsewhere in the market. The court in each case held that a plaintiff does not have the burden of proving the non-existence of suitable alternatives in order to prove injury or the threat of injury, particularly when it is clear that no substitute will have the unique attributes of the product which the defendant denied the plaintiff. However, in none of the cases did the court suggest that the plaintiff does not have the burden of proving the first element: the restraint of trade itself.

Accordingly, the validity of CBS' argument that it does not bear the burden of proving that direct licensing is not a feasible alternative to the blanket license turns on whether the issue of "alternatives" relates to the element of restraint, or the element of injury. We believe that it relates to the first factor: that is whether ASCAP and BMI have restrained trade. In the cases just discussed, plaintiff al-

leged that the defendant would not sell him something which he wanted to purchase, and the defendant argued that the plaintiff was not injured by the refusal because market substitutes were available. The present case poses an entirely different claim. The alleged restraint of trade is not that CBS is excluded from purchasing the services offered by ASCAP and BMI, and told to find substitutes elsewhere; but that (1) they allegedly offer only blanket licenses, which CBS says it does not want; (2) have combined to make any effort to obtain an alternative form of license (such as direct licensing) unfeasible; and (3) thereby compel CBS to continue to take a blanket license and to pay for music which it does not want to buy. Unlike the situations in the cases on which it relies, CBS *does not want the organizational defendant-seller's product at all.* Far from spurning "substitute" products, CBS claims that the lack of a substitute constitutes an alleged restraint of trade. So much is clear when one considers the nature of the direct licensing alternative. It is not at all a "substitute" in the sense used in the "injury-avoidance" cases; it is another means of licensing (on an individual basis) the use of precisely the same music which CBS would perform if it purchased a blanket license. If direct licensing is realistically available, it would enable CBS to pay only for the music it uses and for no other music, and would demonstrate that CBS' complaint in this action is unjustified.

In sum, we adhere to our earlier conclusion, as embodied in the pre-trial order, that to prevail here CBS must prove that defendants' conduct in combining into ASCAP and BMI *compels* CBS to take a blanket license as alleged in

the complaint. Proof that direct licensing is not a feasible alternative to the blanket license is an essential element of CBS' claim, on which it accordingly bears the burden of proof. Conversely, proof that CBS could obtain the necessary performance licenses directly from copyright proprietors would be fatal to its claim that they have pooled the rights to perform their music in a manner which illegally restrains trade in those rights. If the restraint is proven, only then do defendants have the burden of proving that the restraint is justified by the economic context in which music licensing for network television use takes place, and cannot be achieved by less anti-competitive means.

III.

The Stipulation as to Competitive Disadvantage

Prior to trial, the parties executed a stipulation which states in part:

> ". . . There is a portion of the performance rights to ASCAP music appearing on [CBS] programs as to which it would be impracticable for [CBS] or such producers to negotiate for licenses directly with the owners of the performance rights of said music. [Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.]" (CX 2, ¶13; bracketed portion in original.)
>
> "If [CBS] chose not to have an ASCAP license, the producers of [CBS] programs did not obtain such licenses, and [NBC] and [ABC] had such licenses, to

> the extent that [CBS] or the producers of [CBS] programs did not otherwise obtain the performance rights to the ASCAP music which they desired to use on [CBS] programming, [CBS] would be at a competitive disadvantage vis-a-vis [NBC] and [ABC].'"[9] (Id. ¶15)

CBS argues that, putting aside its proof at trial as to the impracticability of the direct licensing alternative, ASCAP and BMI have ceded the primary issue in the case by stipulating that CBS could not obtain direct licenses for all its music needs and that consequently, if it dropped its blanket license, it would be at a competitive disadvantage vis-a-vis networks which continued to hold such licenses.

We disagree with the contention that defendants have stipulated the case away. Paragraph 13 does not specify the "portion" of the compositions in the ASCAP repertory as to which it would be "impracticable" for CBS to license directly; and the extent of "impracticability" is critical to the feasibility of direct licensing. As detailed later in this opinion, the evidence establishes that musical compositions are substantially interchangeable and that for any proposed use there are several, if not scores, of compositions which are equally suitable. Accordingly, even if CBS had access to far less than all of the compositions in the ASCAP and BMI repertories, that would not in itself render direct licensing unfeasible.

Because a fair reading of Paragraph 13 does not indicate that ASCAP and BMI have admitted the unfeasibility

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9. BMI has stipulated with CBS that with respect to the practicability of CBS' obtaining direct licenses from BMI writers and publishers, BMI and CBS are bound by the determination in this case with respect to the practicability of CBS' obtaining direct licenses from ASCAP writers and publishers.

of direct licensing, Paragraph 15 loses the dispositive force which CBS attributes to it. It is obvious that CBS might be at a competitive disadvantage vis-a-vis other networks if it held no music license. But that fact only raises, but does not settle, the question of what licensing methods are available to CBS. We regard the stipulation merely as an aid to the definition of the issues of the case. The extent of CBS's use of music, the kinds of compositions it needs, and the persons with whom it must deal to negotiate licenses for them are factors whose relevance to the feasibility of direct licensing is only suggested by the stipulation, on which the parties reserved the right to offer proof. The decision in this case rests on the evidence as to those factors, not the stipulation itself. Accordingly, we turn to the question whether CBS is in fact "compelled" as alleged in the complaint.

IV.

Compulsion: The Quality of the Evidence

Defendants argue that CBS' case, which alleges the refusal of the defendants to license on terms which require CBS to pay only for the music it uses, falters at the threshold because CBS has not shown that it ever made a clear demand on defendants which they have rebuffed. It is true that several courts have imposed such a requirement in treble damage cases based on a conspiracy to deprive the plaintiff of a particular product. See, e.g., *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theaters, Inc.*, 268 F.2d 246, 251 (2d Cir.), *cert. denied*, 361 U.S. 885, 80 S.Ct. 156, 4 L.Ed.2d 121 (1959); *Webster Rose-*

wood Corp. v. *Schine Chain Theatres, Inc.*, 263 F.2d 533, 536 (2d Cir.), *cert. denied*, 360 U.S. 912, 79 S.Ct. 1296, 3 L.Ed.2d 1261 (1959); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). However, the requirement has not be [*sic*] imposed in any case of which we are aware, when the relief sought is an injunction rather than damages. Cf. *Zenith Radio Corp.* v. *Hazeltine, supra; Credit Bureau Reports, Inc.* v. *Retail Credit Co., supra.*

Although we agree with CBS that it is not required as a condition to suit to have been unequivocally refused the kind of license it now seeks, defendants argument highlights the unusual nature of CBS' claim and the kind of evidence on which it relies. CBS does not claim that it is compelled to take a blanket license because ASCAP and BMI, or individual copyright proprietors, have actually refused or threatened to refuse to negotiate with it for alternative methods of licensing. Instead, its position is that ASCAP and BMI *would* refuse to negotiate new forms of licenses whose fees are based on actual music use; and that individual copyright proprietors *would* refuse to deal with it on a direct licensing basis, or at least make it such a difficult proposition that CBS would be forced to resume its blanket license. Although proof of what might or might not occur under hypothetical circumstances in the future is customary when the plaintiff in a private antitrust action seeks to establish a threat of injury, CBS relies heavily on hypothetical proof in order to establish the existence of the restraint itself—the nonavailability of direct licensing.

The other side of the coin just described is that CBS has made no effort to obtain the kinds of licenses it now

complains defendants are unwilling to grant. Although the absence of such evidence does not establish that CBS is not compelled to take a blanket license, we nevertheless regard it as highly relevant to that issue.

V.

The Break-Up of an Amicable Marriage

Until the institution of the present suit CBS appears to have lived quite happily with the blanket arrangement which it now disavows. Since 1929 it has obtained ASCAP blanket licenses for its various broadcast operations, the earliest one purchased on behalf of a radio station; and when CBS and other broadcasters established BMI in 1939, they agreed to take blanket licenses. Since its establishment in 1946, the CBS television network (CTN) has continuously held blanket licenses from ASCAP and BMI. Since 1950, CBS' negotiations with ASCAP for licenses for its television network have of course been conducted within the framework of the amended consent decree. Although, as noted earlier, the terms of the 1950 decree prohibit ASCAP from negotiating a blanket license prior to determining whether the user would prefer a per-program license,[10] CBS has never applied for relief under the decree complaining that ASCAP insisted on blanket licenses. Nor has the court ever been required to set a "reasonable fee" for the blanket licenses negotiated by the parties from time to time. CBS has never negotiated or held a per-program license from ASCAP or BMI for its television network and has never attempted to fullfill its

10. See note 3, *supra*.

music requirements by bypassing either organization and securing performance rights directly from copyright owners.

This suit did not follow a breakdown in negotiations for a new form of license, but for a renewal of CBS' *blanket* license from BMI. In April, 1969, CBS and ASCAP submitted for court approval agreements providing for final license fees as adjusted for 1969 and several prior years. Because the payments provided for in the agreements would have had the effect of sharply widening the historical ratio between BMI and ASCAP fees from CBS, BMI's President, Edward Cramer, protested to Donald Sipes, CBS' Vice President in charge of business affairs for the network, that BMI would insist on maintaining parity with ASCAP. After several meetings between Sipes and Cramer in 1969 during which the latter was unable to negotiate higher fees, BMI gave notice on October 29, 1969 that it was exercising its right under the consent decree to terminate CBS' license, effective January 1, 1970.

CBS did not apply for relief under the decree. Instead, on December 19, 1969, more than a month and a half after BMI's notice of termination, and less than two weeks before termination would become effective, the President of the CBS television network, Robert D. Wood, wrote to ASCAP and BMI requesting each of them to "promptly submit to us the terms upon which you would be willing to grant a new performance rights license which will provide, effective January 1, 1970, for payments measured by the actual use of your music." This was the first such demand CBS had made. By letter dated December 23,

1969, Herman Finkelstein, ASCAP's general counsel, replied that ASCAP would consider the proposal at its next Board of Directors meeting on January 29, 1970; that it regarded CBS' letter as an application for a license in accordance with the consent decree; that CBS would in the meantime have an interim license for 60 days "at rates and terms to be negotiated, or determined ultimately by the court;" and that representatives of ASCAP would meet with CBS counsel on January 12, 1970 to discuss the application further. (PX 201)

By letter dated December 23, 1969 Cramer replied to CBS' request on behalf of BMI and stated that "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." (PX 202) CBS did not, however, pursue the matter further. Instead it commenced this lawsuit a week later, on December 31, 1969.

Neither the history of the relationship between the parties nor the events leading to this action remotely suggest that CBS has been compelled to take a blanket license it did not want. Indeed, CBS does not even appear to have seriously considered available alternatives to the blanket license prior to the commencement of suit. CBS' Vice President in charge of business affairs and planning for the network, Donald Sipes, was its principal witness as to the undesirability of blanket and per program licenses, and the need for a license under which the fee would be based strictly on actual use. Sipes testified that he first decided to explore alternatives to the blanket license sometime in 1968 or 1969. Although he was almost completely

unacquainted with the intricacies of music licensing, he spoke to only three people in the course of his exploration. Two of these, Robert Evans and John Appel were house counsel for CBS. Sipes spoke to them only in their capacity as counsel, and did not seek their advice on the business aspects of licensing. The third person Sipes consulted was Emil Poklitar, the CBS employee in charge of the clerical personnel who process music logs and case sheets submitted by program producers to be sure the necessary rights have been cleared. Poklitar is not a business man and his duties involve a narrow portion of the music licensing spectrum.

Despite Sipes' lack of expertise, neither he nor his colleagues at CBS consulted any music writers, publishers, television producers or any other expert in the field about possible alternatives to the blanket license. (Tr. 151, 204, 358, 371) No one at CBS ever conducted a feasibility study about presently available or proposed methods of licensing the music to be performed on its television network. (Tr. 156-57) Indeed, Sipes testified that he did not even speak to other CBS executives about alternatives to the blanket license; he considered the alternatives entirely on his own initiative. (Tr. 180, 369) In sum, CBS thought very little indeed about revising its licensing practices prior to Robert Wood's "demand" letter to ASCAP and BMI just prior to the commencement of this suit. The evidence described hardly supports CBS' contention that it has been compelled to take a blanket license. To the contrary, it suggests that CBS did not even view music licensing as a business problem until immediately prior to suit.

VI.

The Claim That the Structure of the Market Bars Direct Licensing

In the absence of direct evidence that ASCAP and BMI and their members and affiliates have refused to negotiate licenses which reflect actual music use, CBS' claim that it is compelled to take a blanket license hinges on proof that the direct licensing alternative which exists in theory under the consent decrees is not a viable method for securing the necessary performance rights.

CBS claims that it established at trial that the defendants have structured the market in such a way as to lock it into a blanket licensing arrangement and to make any attempt to license its music needs directly so prohibitively risky as to preclude it even from trying. The basic elements of this claim are illustrated by the following syllogism: First, it would be uneconomic for CBS to attempt direct dealing while it still holds a blanket license, because it would then be paying twice for the same music: that is, since the blanket license fee covers unlimited use of the ASCAP or BMI repertory, direct licensing transactions would involve the purchase of additional licenses for music already covered under the blanket arrangement. Second, because copyright proprietors and television networks have never engaged in direct dealing, the transactional machinery necessary to negotiate and clear direct licenses between CBS program producers and the large number of individual copyright proprietors has not been developed; and the absence of such machinery creates a "barrier" to direct licensing. Third, because the blanket license system

insulates copyright proprietors from price competition among themselves, they have no incentive to create the necessary machinery, and indeed would refuse to deal with CBS if it attempted to license its needs directly. Fourth, the risk of a refusal to deal is particularly acute in relation to CBS' present inventory of programs and films, which contains a large number of performances of copyrighted music whose initial runs on television were licensed under a blanket license. If CBS dropped its blanket license, it would need to seek direct licenses for the music contained in any programs which it plans to rerun because a rerun constitutes a performance for profit. Accordingly, the CBS inventory would be vulnerable to "hold-ups" by copyright proprietors who could either refuse to license their music at all, or exact a premium price for it.

In sum, CBS claims to have established that because there is at present (1) no market machinery for direct dealing; (2) no expectation that it will be created; and (3) reason to believe that proprietors would refuse to deal with CBS, particularly with regard to programs in its existing inventory which it wishes to rerun, direct licensing is not a feasible alternative and defendants illegally compel CBS to continue to take a blanket license. To understand the evidence relating to these claims, it is necessary first to describe the nature and extent of CBS' use of music.

VII.

CBS' Use of Music

Music is used on network television in three principal ways: as theme, background or feature music. Theme music is the music used to introduce and close a program.

Background music is used to complement action on the screen. Feature music is music used as "the main focus of audience attention" (PX 469); for example a performer singing a song on a variety show. Occasionally, however, well-known compositions suitable for feature use may be used as background music, for example, "Tea for Two" as background to a tea party scene. CBS concedes that it would be a simple matter for it to obtain direct licenses for most of the theme and background music it uses, and that the key to the feasibility of the direct licensing method is whether it can obtain licenses for the feature music and some of the background music it needs. To understand why this is so, some familiarity with the manner in which television programs are produced is necessary.

As noted earlier, CBS itself produces virtually none of its "entertainment" programming. Apart from the news, public affairs, sports and special events programs—which CBS does produce and which make little use of music—the bulk of the programs broadcast over the network are acquired from independent program production companies, or "packagers." Some of the packagers are well-known Hollywood "majors," such as MGM, Universal and Paramount. Variety shows and some of the filmed serials are produced by smaller production companies, which are sometimes owned by the star of the show. For example, the "Mary Tyler Moore Show" is produced by MTM Company, Ms. Moore's own; and "The Carol Burnett Show" is produced by her husband's company.

Ordinarily, the music used on entertainment serials is almost exclusively theme and background music composed especially for the program. For example, after the pro-

gram has been filmed or taped, the producer typically hires a background composer to view the film, decide which action requires musical background, score the music and arrange and conduct the music scored. The producer pays the writer a fee for this work and acquires the copyright from him, as an "employee for hire." Theme music is created the same way, but the same music is of course used from week to week over the life of the series.

The producers of most of CBS' regular programs own publishing subsidiaries which acquire the copyrights for the music which has been specially composed for the program. For example, CBS itself owns April Music, which in turn owns the rights to the background music used in "Gunsmoke." The producer of "The Carol Burnett Show" owns Burngood Music and Jocar, which acquire the music specially created for that show such as background music for comedy sketches. Major studios, such as Universal, own major publishing houses, such as Leeds Music, which in turn own the rights to music created for Universal's television programs. The publishing subsidiaries receive royalty distributions from ASCAP or BMI for performance of music on the shows created by their parent company. The royalties are of course a small fraction of the amount the producer receives from CBS for the program package itself. CBS may pay upwards of $200,000. for a one hour episode of a dramatic serial; the publisher's performance royalties for that program may amount only to about $1,500.

This description of the process by which theme and background music is created makes clear that CBS can easily acquire performance rights for such music as part

of the same transaction by which it acquires the program itself. Because the program production company, or its publishing subsidiary controls the rights to music specially created for the program, CBS could license the right to perform that music at the same time and place as the overall right to televise the program.

In contrast to theme and background music, feature music is not usually composed especially for the program. Rather, it is music which has been previously composed, and is controlled by a publisher who is not connected with the program production company. Feature music, and theme and background music whose copyrights are controlled by an "outside" publisher, cannot of course be licensed as a part of the overall transaction by which CBS acquires the program. Instead, in order to obtain rights to such music, it would be necessary for CBS or the program producer to approach the publisher who owns the rights to the music in question. As noted earlier, it is the feasibility of obtaining the licenses to this "outside" music on which the viability of the direct licensing alternate substantially depends.

In order to establish how much of CBS' music needs would require "outside" direct licensing transactions (as opposed to "inside" transactions with the program producer or his publishing affiliate whose feasibility CBS generally concedes) both sides have introduced into evidence computer runs which they claim establish the extent of CBS' music use in the three basic categories. In general the computer runs and the testimony relating to music use verify what the average television viewer would assume. CBS' news and public affairs programs use vir-

tually no music; the staple situation comedy, crime and drama series use almost exclusively theme and background music specially composed for the program; and feature and background music controlled by outside publishers not connected with the program producer is used regularly on a small group of programs: variety shows and variety specials, sports shows (e. g., football halftime shows), late night talk shows, and the "Captain Kangaroo Show."

Although the parties are in agreement as to the general pattern of CBS' music use, they differ in their claims as to precisely how much music CBS uses in each category and how evenly its use of music is distributed over the program schedule.

We believe it fruitless and unnecessary to determine the question whether CBS or defendants have more accurately interpreted the data as to CBS' use of music. It is fruitless because, as both sides concede, the data of record do not permit complete analysis. It is unnecessary because the validity of the conclusions which the parties seek to draw does not at all hinge on the few percentage points which separate the parties. Thus, defendants argue that the available data show that some 85-90% of CBS' programs used only "inside" music which could be conveniently licensed through the program packager, or no music at all; and that the music for another 5% of the programs could be licensed by seeking performance rights from only one "outside" publisher. According to defendants, only 3-4% of CBS' schedule is made up of programs (such as variety shows) which make heavy use of outside music, requiring licenses from several outside publishers. Accordingly, defendants argue, CBS could acquire

the necessary performance rights for nearly all of its programming without the creation of the "machinery" which CBS claims (as discussed below) is required to facilitate transactions between producers and publishers. This assertion is not inconsistent with CBS' argument that, even adopting defendants' figures, direct licensing for the few programs which do make heavy use of "outside" music would be impracticable in the absence of "machinery" to service the large number of transactions which would be required. In short, no matter whose figures are closer to the truth, the question would remain whether the lack of "machinery" destroys the feasibility of direct licensing as an alternative to the blanket license and constitutes an illegal restraint of trade.

VIII.

Are There "Mechanical" Obstacles to Direct Licensing?

A. The Legal Significance of "Machinery"

Prior to trial the parties stipulated that ASCAP members and BMI affiliates "have not established facilities or procedures" for processing requests by music users for direct licenses for performance rights. (CX 2, CX 3) CBS argues that the fact that the individual defendants have not established such "machinery" constitutes a "barrier" to direct licensing which compels it to take a blanket license. (CBS Post-Trial Reply Brief at 29) Putting aside the question of the kind of machinery CBS claims to be necessary and whether its absence does in fact make direct licensing of outside music unfeasible, we disagree with

CBS that defendants' mere failure to have created machinery amounts, without more, to an illegal refusal to deal. (CBS P st-Trial Reply Brief at 27)

As outlined above, CBS has not, in the many years it has held blanket licenses, indicated a wish to fill its music needs by means of direct licensing. There is no evidence of substance that before bringing this suit it ever considered such an alternative in its own business planning. The only expression of its dissatisfaction with the blanket system was the "demand" letter sent by the network President, Robert Wood, two weeks before the commencement of this suit. That letter did not even refer to direct licensing, nor of course to obstacles, such as the lack of "machinery," which arguably prevented CBS from engaging in direct dealing with copyright proprietors. Rather, the letter related only to CBS' request for alternative methods of licensing *through ASCAP* and *BMI*. In short, there is no evidence that CBS gave any thought to the need for machinery, or noticed its absence, prior to this litigation.

It is simplistic, in view of these facts, to argue that "by virtue of [defendants'] preemption of the field, there are absolutely no facilities in existence for . . . direct licensing . . ." (CBS Proposed Findings at 37). The "field" consists of buyers as well as sellers, and by taking a blanket license for twenty years, CBS (as well as other broadcasters) has "preempted" any need for the machinery whose absence is now claimed to constitute an antitrust violation. We are unable to accept the proposition that defendants have had the obligation to create the framework for a direct licensing system, particularly in the absence of any indica-

tion that CBS would ever wish to use it. There is no evidence, and indeed CBS does not claim, that defendants have refrained from creating the necessary machinery for the purpose of injuring CBS. In these circumstances, the fact that defendants have so far done nothing to facilitate direct licensing does not support the conclusion that they are illegally restraining it.

B. Problems Allegedly Created by the Lack of "Machinery"

Putting aside the question whether the mere absence of machinery illegally restrains trade in the market for performance rights, CBS has failed to prove that there are substantial mechanical obstacles to direct licensing. CBS postulates that under its new proposed licensing system it would pass on the job of licensing "outside" music to the production companies. In such a case, inside music would be conveniently licensed through the program packager and its publishing subsidiary. However, the producer would take on the additional job of obtaining rights to the outside music to be used on the program by contacting the publishers in question (or their agents, as described below) and dealing for the performance rights.

CBS' principal witnesses as to the need for machinery were Robert Wright, associate producer of "The Carol Burnett Show," and Edward Vincent, a former staff member of several network programs. Wright and Vincent are in the position of those who would use whatever machinery is required for direct licensing. In general the testimony of these witnesses was not persuasive, and their views on

machinery were vague and abstract.[11] (e. g., Tr. 482-83, 500, 687) Three basic claims emerge from their testimony. First, CBS asserts that the producer in a direct licensing world would sometimes have difficulty in identifying the publisher of a given composition in order to approach him for a license. The argument is based on the fact of life in the industry that publishers' catalogs shift as they buy and sell copyrights, so that the publisher listed on the sheet music or record label may no longer own the composition when the producer wants to license it. CBS further claims that even assuming the producer can locate the publisher, the negotiations will be beset by confusion because, as defendants concede, music publishers have no established procedures for dealing with requests for performance licenses. Accordingly, the argument goes, direct licensing would be impracticable until settled ways of negotiating licenses are developed and publishers train their staffs to handle licensing. Finally, even assuming the producer can speak to the publisher in a language he can understand, CBS claims that difficulty would be caused by provision in certain contracts between writers and publishers requiring that the writer's consent be obtained prior to the grant

11. We note in passing that most of the testimony of Wright and Vincent as to the need for "machinery" related to the peculiar needs of producers of CBS' few variety shows, which make unusually heavy use of outside music and are produced on short production schedules. CBS did not offer proof as to how the needs of variety show producers for "machinery" differ from the needs of producers of programs which use outside music less regularly and in more modest amounts, and in which speed is not of the essence in the licensing transaction. Accordingly, even if we found the testimony of Wright and Vincent to be more persuasive than we do, it would be of limited value to establish the extent of the "machinery" necessary for shows other than variety shows.

of a direct license by the publisher. A provision requiring such consent appears in the form contract of the American Guild of Authors and Composers (AGAC). CBS claims that ASCAP's computer runs of CBS' music use show that some 40% of the outside music it uses is written by AGAC composers, a figure we adopt arguendo; and that the need to obtain writer consents for the use of that music would delay direct licensing transactions and disrupt the tight production schedules under which some programs are produced, particularly variety shows.

For the reasons stated below, we find that CBS' claims as to the effect of lack of machinery are without merit. There are two basic flaws in CBS' general approach. First, CBS' premise that it would abruptly cancel its blanket license and seek to fulfill all its music needs by direct licensing on the next day (see, e. g., Tr. 463, 633, 1874, 1912-13) is utterly unrealistic. If CBS took such a course there might well be problems of the kind just described. But this would not be proof that defendants have created obstacles which render direct licensing unfeasible. As noted earlier, nothing in the antitrust laws requires defendants to maintain well-oiled machinery for direct licensing for the benefit of CBS. Indeed, there is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation. Accordingly, to presuppose, as CBS does, that the feasibility of the direct licensing alternative is to be judged literally as of "tomorrow" miscasts the issue. The proper question, we believe, is whether such mechanical obstacles as exist could be

remedied within a reasonable period prior to cancellation of the blanket license.

The second flaw in CBS' approach is that it postulates that new direct licensing machinery would of necessity be an edifice entirely distinct from the machinery which now exists for the purpose of licensing other kinds of rights in music, in which ASCAP and BMI do not deal. As outlined earlier, the program packager is responsible for obtaining all rights necessary to televise the program except performance rights, which CBS obtains from ASCAP and BMI. These rights include "synch" rights, that is, the rights required for any program which is to be rerun. Program producers now obtain "direct" licenses for synch rights from publishers through "machinery" created for that purpose. Similarly, movie producers obtain from publishers the rights to record and perform the music they use, (i. e., "mechanical rights" or "mechanicals") and there is "machinery" for this purpose as well.

Thus, although CBS is literally correct that "there are absolutely no facilities in existence for the direct licensing of [performance] rights by music publishers or other proprietors" (CBS Proposed Findings at 37), it overstates the issue to assume that such facilities would have to be created "from scratch" (CBS Post-Trial Brief at 40). The narrow question in the first instance is whether, as ASCAP and BMI contend, the machinery which publishers and producers now use to license other kinds of music could be adapted to facilitate the licensing of performance rights as well.

C. A Look at Other Kinds of Machinery

Apart from television performance rights, other rights in copyrighted music include motion picture synchronization and performance rights, and television synchronization rights. While ASCAP and BMI do not deal in these rights, facilities to license these rights directly from copyright owner to user do exist.

The television synchronization right is the right to record copyrighted music on the soundtrack of a filmed or taped program. Such rights are required for programs which are to be rerun, as distinguished from those (such as sports events or certain "one-run" taped programs) which are regarded as "live" performances. The grant of TV "synch" rights is almost exclusively brokered through the facilities of the Harry Fox Agency, Inc., which represents virtually every major publisher, about 3,500 in all. As outlined by Fox's Managing Director, Albert Berman, and by Robert Wright and Edward Vincent, who are members of producers' staffs, the typical "synch" rights transaction starts with a telephone call to Fox from the producer or from Bernard Brody or Mary Williams, synch rights agents located in Los Angeles who represent producers in their dealings with Fox. Because Fox has instructions regarding each publisher's fee structure, (or, more often, is familiar with it on the basis of past experience) it is usually able to quote prices over the telephone for the compositions which interest the producer. The entire transaction, including actual issuance of the license, is completed within two to three days at most. Fox issues several thousand television

synchronization licenses annually, using a basic staff of only two employees.

A "movie rights" transaction consists of the licensing of the performance right *and* synch right in one package for use in a theatrical (as distinguished from television) motion picture. The versatile Fox Agency also represents publishers in the licensing of these rights. The negotiation is similar in form to the TV "synch" rights. As described by Marion Mingle, the Fox employee who handles movie rights, producers call or write to Fox requesting price quotations on a number of compositions. Mingle or her assistant then telephones the publisher and outlines the nature of the film and the kind of use which is to be made of the composition in question, so that he can quote the price for the right. Generally, the producer either accepts or rejects the various quotations on the spot; sometimes, however, he may make a counter-offer which Mingle passes on to the producer. In general, Mingle can quote prices to the producer within two days. She and her assistant license several hundred movies each year.

D. Could Other Kinds of Machinery Help CBS?

As note [*sic*] earlier, CBS claims that the non-existence of direct licensing machinery in the television performance rights field would practically bar direct dealing in several critical aspects: the producer would have difficulty in identifying the copyright owner of a song which had been sold to another publisher; the AGAC writer-consent requirement would delay the licensing transaction and disrupt production schedules; and publishers would be unable to

handle requests for licenses because they have no staffs or procedures for direct dealing in performance rights and have not created a central facility such as the Fox Agency to facilitate contact between producers and publishers. These claims dissolve in view of the evidence as to the licensing of other rights in music.

1. Finding Copyright Proprietors

In most cases the producer of a CBS show would have no difficulty identifying the "outside" publisher of a song for which he wants a performance license because he or his agent already deals directly with that publisher to obtain a synch license for the same song. As former CBS Vice President in charge of programming, Michael Dann noted, any program on tape or film is likely to be rerun, and program packagers usually obtain synch rights at the time the program is produced. Wright, who is on the staff of "The Carol Burnett Show," testified that problems in clearing synch rights are "rare." Edward Vincent, a former staff member of "The Jim Nabors Variety Hour," testified that the Bernard Brody Agency would have no difficulty in giving him the name and address of any copyright owner.

Even if lines of communication to obtain synch rights were not already established, there are several other ways in which a producer could identify the publisher of music he plans to use. Emil Poklitar, who works in CBS' music clearance department stated that CBS maintains a file containing the relevant information on over 100,000 compositions. Indeed, as Wright testified, publishers regularly

barrage television producers with catalogs and brochures to promote the use of their music. Where they have not done so, there appears to be no reason why CBS could not simply request the catalogs of the major publishers. Finally, it should be stressed that in the vast majority of cases, the copyright owner listed on the sheet music or phonograph record is still the owner of the composition in question.

2. The AGAC Writer-Consent Requirement

Nor has CBS proven that the writer consent requirement in the AGAC form contract would cause significant delay in direct negotiations for performance rights. At present, publishers are required to obtain an AGAC writer's consent for television synch licenses for songs over ten years old, and movie synch licenses for vocal use of a composition. (3M PX 31) Although Leon Brettler, Vice President of Shapiro, Bernstein & Co., a major publisher, testified that he has occasional difficulty contacting a writer who is on vacation or has just changed residence, the record establishes that meeting the consent requirement rarely causes delay in the issuance of a license. In addition to Brettler, several publisher witnesses were asked if they had trouble getting in touch with their writers. For example, Edwin H. Morris, who owns a company bearing his name, testified he has had no difficulties in doing so. Salvatore Chiantia, of MCA Music, testified that he is routinely able to locate his writers and obtain their consent. The reason why publishers have little difficulty in contacting a AGAC writer and obtaining his consent

promptly is not hard to fathom: writers are intensely eager to have their work performed on television. Many AGAC writers have simply given advance blanket consent to their publishers to avoid the risk that the producer will, because of time pressures, substitute a different song. As Chiantia stated in a letter to AGAC concerning consents for background uses (PX 84):

> ". . . if we are not able to give licenses to TV film producers at $25. per film, or if we have to obtain the written consent of each writer for each individual use, we would for all practical purposes never get the compositions from our catalogs into current TV films other than in a few rare instances. The writers who have given us their approval are aware of the competitive situation which exists in connection with the use of music in the filmed TV programs produced in Hollywood. It is because of that very reason that they gave us their okay to go ahead." (PX 84)

In the same vein, Louis Bernstein of Shapiro, Bernstein & Co. wrote AGAC:

> ". . . Please bear in mind that the authors and composers who come into our offices are desperately hungry for performances, which means money from ASCAP. A good number of writers have urged us to get them these performances and stop worrying about the AGAC technicalities. Even so, 19 out of 20 writers would gladly give us any authorization in writing, but since we are dealing with several thousand writers, it becomes a difficult job to be so technical." (PX 162)

There is every reason to believe that most writers would either give their publishers blanket consent for perform-

ance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch rights. As Chiantia testified:

> "It is no different than the situation with respect to synchronization rights. Why do you have any greater difficulty in this matter than you have in synchronization rights? There are certain synchronization rights that you need that I have to get my writer's permission on and you get them. Why suddenly do you have such a great problem in respect of getting performance licenses where you don't have that same problem in getting synchronization licenses." (Tr. 2970)

3. The Need For Centralized "Machinery"

Although CBS has failed to prove that producers seeking performance licenses could not identify copyright owners, or that the writer consent requirement would significantly delay direct licensing of performance rights, we agree that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered. Without such machinery, direct licensing might be mechanically feasible, but would be a bulky and inefficient system: for a program producer (or an agent such as the Brody Agency) to contact each of the publishers whose compositions interest him, for every program, would of course be distinctly time-consuming and expensive.

In the past, the Fox Agency has responded to publishers' needs for central "direct-licensing" machinery for new kinds of music rights by expanding its long roster of services. Defendants argue, accordingly, that music

publishers would turn over the job of clearing television performance rights licensing to Fox as well. CBS replies that defendants oversimplify the problem of creating machinery because there can be no assurance that the Fox Agency will agree to take on the job of brokering performance rights. Of course, it is possible that Fox would refuse the opportunity to expand its business. But the lack of hard evidence on the point is chargeable to CBS, not defendants. Never having explored the feasibility of direct licensing, CBS has not given Fox any occasion to consider the possibility of brokering such licenses. In any event, there is no substantial basis for concluding that the Fox Agency would not expand its services to include television performance rights, just as it has expanded in the past to meet the need of publishers for a central agency for movie performance rights and television "synch" rights. However, even if Fox were unwilling to take on the job of brokering performance rights, the creation of a new agency modeled along the same lines need not be the imposing project CBS makes it out to be. Albert Berman, Fox's Managing Director, testified as follows:

> "Q Mr. Berman, you were asked by Mr. Hruska on direct something about suppose publishers ask you to take over licensing of public performances on network television. Do you remember that question?
>
> A Yes.
>
> Q And as I understood it, you said that you wanted to make a study before giving a detailed answer.
>
> A Yes.
>
> Q Let me ask this, sir: Would the task be significantly different from the task you now have when licensing TV sync [*sic*] rights?

> A Only in numbers. It is certainly much more formidable merely because the uses would be so much greater. But the job could be done, I assume, with enough people and enought [*sic*] physical equipment." (Tr. 973-74)

Berman did not testify, and CBS did not offer proof, as to how many people and how much physical equipment would be required. According to CBS' projections, which we adopt arguendo, the number of direct licensing transactions required each year from outside publishers would range from approximately four thousand to eight thousand. (The low figure is projected from a period in 1971 when CBS had three night-time musical variety series; the high figure is based on a period in 1970 when it had seven such programs. CBS does not make a projection for the season which began in the Fall of 1974, during which it offered only one variety serial, "The Carol Burnett Show.") The question is whether CBS' projection of some 4,000 to 8,000 transactions would entail a large number of complex tasks requiring a massive staff, or a simple task repeated four thousand times by a relatively modest one. CBS' post-trial submissions strain to give the impression that each time a producer wished to use a certain type of composition, Fox or its newly created equivalent in the performance rights field would have to contact several different publishers, who in turn would have to check whether the AGAC writers (if any) whose music is involved would give their consent to the grant of a license, and then begin active price negotiations for the song or songs in question. (CBS Post-Trial Brief at 37-44, Reply Brief at 39-40).

It is unrealistic to assume that such cumbersome procedures would be involved in a direct licensing world; indeed CBS' own papers offer the key to streamlining the job. As noted early in this opinion, CBS seeks as one form of relief in this suit the establishment, under court supervision, of what it calls a "per-use" system. Under the per-use system, as outlined by CBS,[12] musical compositions would continue to be licensed through ASCAP and BMI, but instead of taking a blanket license, CBS would license individual compositions, for which it would pay a specified fee for each use of music from the per-use "reservoir." The fee for each license would be fixed in a schedule reflecting the nature of the use (e. g., theme, feature or background) and other appropriate factors, such as duration of use. CBS suggests that one convenient way to set a fee schedule is to adopt the present formula by which ASCAP and BMI give royalty "credits" to their members and affiliates. (CBS Post-Trial Reply Brief at 71) The question which naturally arises, and CBS does not answer, is why publishers would not readily adopt the same concept of a fee schedule[13] under a direct licensing system,

12. The outline of CBS' "per-use" proposal are [*sic*] set forth at note 7, *supra*.

13. Instead of addressing itself to the feasibility of a fee schedule in a direct licensing world, CBS postulates that a central licensing agency for performance rights would require a "massive" staff because the negotiation of such rights would be more time-consuming and complex than the "cut-and-dried" negotiations which are the rule in the television "synch" rights field: setting a price for the former would involve factors such as the nature and duration of the use and the unique attributes of a particular song (e. g., "Happy Birthday"). The argument is without merit. It is true, as CBS points out, that in most cases television "synch" rights negotiations are fairly clean cut.

(footnote continued on next page)

in which case a centralized computer would store information as to prices as well as other necessary information for each publisher's catalog.

Of course, it is not for the court to propose a system for direct licensing. Nevertheless, on studious review of the record, we are left with the belief that careful planning would go far to remove any significant "mechanical" obstacles to direct licensing for performance rights. It is true, as CBS points out, that new personnel would have to be trained to handle the task. But the only evidence on the point indicates that new central machinery could be staffed primarily by clerical personnel, as it is at Fox. The period required to train such personnel is presumably measured in weeks or months, rather than years.

Such a finding is supported by CBS' own scenario as to how things would go in the event it prevailed in this suit: either of its proposed forms of relief—the establishment of its "per-use" system under ongoing court supervision; or a mandatory injunction against the issuance of blanket licenses to any network by ASCAP and BMI—would require the development of "machinery" at least as extensive and very much of the same pattern as that involved in

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However, synch rights *and* performance rights for movies are negotiated in a single package; and accordingly the nature of the movie rights transaction provides a more relevant basis for determining CBS' argument that performance rights negotiations would be a complicated matter. As described by Marion Mingle, who handles movie rights at the Fox Agency, the increased complexity of the performance rights transaction amounts to asking the producer about the nature of the intended use and passing on the information to the publisher. (Tr. 870-71, 876-77) Mingle testified that she can generally supply quotations to producers within two days and, as noted earlier, she and a single assistant handle all of the several hundred movie rights licenses Fox issues each year.

a direct licensing system under the consent decrees. For example, if CBS won an injunction against the issuance of blanket licenses, it would of course be faced with the very same mechanical "barriers" to direct dealing of which it now complains so strenuously. Nevertheless, Donald Sipes, CBS' Vice President in charge of business affairs and planning for the network, freely conjectured that in such an event the lack of "machinery" would pose no problem because ABC-TV and NBC-TV would be "in the same boat":

> "A Under that assumption, all three networks are in the same boat. In other words, neither one of the three—that's bad English—but none of them have a competitive advantage, you see, over the others.
>
> Q Assuming that, then what?
>
> A Assuming that with a lot of struggle and some chaos up front, I think again that the machinery necessary to broker deals between the sellers and the buyers in this situation will spring up to fill that gap. There is a need, there is money to be made, and people will spring into that breach to fill that need and make it happen. And deals, direct deals will be made for musical compositions between buyers and sellers.
>
> Now, I do believe, of course, that it will take some time for that machinery to develop up front, but of course all three networks in that situation would have that same problem.
>
> Q Suppose, Mr. Sipes, the injunctive order, in other words the order prohibiting ASCAP and BMI from licensing television networks, the effective date of that order was deferred for a period of, let's say, a year. Would that remove the struggle you mentioned earlier in your answer? Would that solve that problem, in your mind?

A I think that during that time the machinery would develop, yes, sir." (Tr. 79-80)

As we view the matter, CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing. If CBS' Vice President in charge of the very subject at hand concedes that within one year suitable machinery would "spring up," no reason appears on this record why it could not in any event plan to change over to direct licensing, effective one year hence, without a court order to spur the effort.

CBS' sole response is that copyright proprietors would not of their own accord leave the safe haven of ASCAP and BMI and expend their resources to set up the machinery for direct dealing because they are afraid to engage in price competition for their works; and that only a court order could provide the "signal" that they must do so. The argument is unpersuasive. Assuming that copyright proprietors would in fact be willing to deal with CBS producers—a conclusion we reach in the next section—they would logically create an efficient mechanism to facilitate it (as they have in the case of other music rights), if only to hold down their own costs. In any event, the cost of creating new machinery would be passed on to music users, just as it is at present through ASCAP, BMI and the Fox Agency.

In sum, as stated earlier, CBS might well have "machinery" problems if it cancelled its blanket license "tomorrow." But this is not proof that defendants have created

"barriers" to direct licensing in order to compel CBS to take a blanket license; it is just as consistent with the fact, which the evidence establishes, that no one, including CBS, imagined that the blanket license would lose its charms until shortly before this suit. Because CBS does not claim that it would commence direct licensing tomorrow (although its counsel often questioned witnesses on the assumption that it would), the relevant question is whether the relatively modest machinery required could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could.

IX.

Would Copyright Owners Attempt to Thwart Direct Licensing?

A. The Nature of CBS' Proof

In the absence of proof that direct licensing is unfeasible because of mechanical obstacles CBS' case rests primarily on its claim that copyright proprietors would refuse to deal directly if CBS asked, or at least make it such an arduous and expensive proposition that CBS would be forced to resume the blanket arrangement. (CBS Post-Trial Reply Brief at 29) Indeed, in a substantial sense, the "disinclination issue," as it has come to be called in the course of the lawsuit, is the major factual issue in the case. As CBS' post-trial papers recognize, even questions such as mechanical feasibility hinge almost exclusively on the willingness or unwillingness of the defendants to smooth CBS' course or obstruct it, as the case may be. (See, e. g., CBS Proposed Findings at 45-47)

Such a claim is difficult to prove even in the best of cases, and the present suit is no exception. CBS' Vice President Donald Sipes testified that CBS has never sought a direct license. The three CBS witnesses who predicted that writers and publishers would refuse to deal with producers were Sipes, and producers Robert Wright and Edward Vincent. Their testimony on the point was unimpressive, particularly inasmuch as none of them had ever spoken to a publisher or a writer in relation to performance rights licensing. Vincent's direct testimony is representative:

> "Q Let's go back to the delays you said you anticipated getting a secretary on the telephone, et cetera. Don't you think that copyright proprietors are going to see to it that all those delays are removed in this world in which the CBS Television Network has cancelled its ASCAP-BMI licenses?
>
> A No, I don't believe that because I am assuming on the basis of this particular lawsuit, that ASCAP and BMI like things the way they are.
>
> If you are asking me to assume that they are going to have a parade for me if I tell them in front I am going to run an end run around their entire organization and attempt to deal direct and circumvent the ASCAP and BMI—
>
> The Court: I don't think that is the question Mr. Hruska asked you. I think he asked you whether you wouldn't expect the copyright owners to make quick arrangements to deal with you if CBS didn't have a—
>
> A No, sir, I don't, and that's the reason I don't. I don't believe that they would want to see that particular system succeed.

The Court: Do you have any basis for saying that?

The Witness: Well, as I began to state before, your Honor, there is a system under which they are operating now, which I assume for them is a very good system and that they like—" (Tr. 636-37)

* * *

"The Witness: Your Honor, it is my opinion that we are talking about members of a group, of a group that has banded together for a very specific reason, and they have sought the shelter of this group for good and reasonable reasons, again, I assume.

You are also asking me if I think that I am going to expect them to want to deal with me?

The Court: Yes, I am.

The Witness: To come toward me and say, 'Yes, let's make a deal,' after I have circumvented their group.

No, your Honor, I don't believe that prudent business sense dictates that I should believe that.

The Court: I mean that's just on your general experience, you are saying that?

The Witness: Yes, sir." (Tr. 639-40)

Despite the testimony of Sipes, Wright and Vincent that many if not most ASCAP members and BMI affiliates would be "disinclined" to deal directly with producers for performance rights, none of them could give the name of even one actual publisher or writer whom they thought would fall into that category. Sipes has never spoken to a copyright owner. (Tr. 204, 358). Wright, who is associated with "The Carol Burnett Show," was "confident" that ASCAP members would be reluctant to deal with him, but

was certain that Joe Hamilton, who wrote the theme music for the show would be inclined to deal (Tr. 489). Edward Vincent, of the Jim Nabors show, stated that the two writers with whom he had actually worked would deal with him (Tr. 726). CBS' economist Franklin Fisher, also expressed the view that ASCAP members would be reluctant to deal but, like Sipes, he has never spoken to a writer or publisher (Tr. 4853).

In the absence of evidence that any ASCAP member or BMI affiliate has ever refused or even threatened to refuse to grant CBS direct performance rights for any composition, CBS offered evidence as to (1) the strong economic incentives which would deter copyright proprietors from direct dealing (2) the experience of the Minnesota Mining and Manufacturing Company (the "3M" incident) in direct licensing its music needs for a background music tape and tape-player which it marketed in the mid-1960's and (3) the ease with which defendants could thwart a direct licensing attempt by CBS, by exacting premiums for the licensing of music already taped or filmed, (music "in the can") which has until now been covered by a blanket license.

B. The Alleged Incentives to Refuse to Deal

CBS' Post-Trial papers postulate the fact, which we adopt arguendo, that participants in the market for performance rights are rational businessmen motivated by the wish to maximize profits. It excuses its failure to pursue alternatives to the blanket license by arguing that "no reasonably prudent manager of a television network" would subject his company to the risks involved. (CBS

Proposed Findings at 33, 36) By a similar line of reasoning CBS contends that no prudent copyright proprietor would voluntarily relinquish the bargaining leverage and shield against price competition which ASCAP and BMI provide. According to CBS' theory of the case, these essentially hypothetical facts establish both the restraint (i. e., the unavailability of the direct licensing alternative) and the threat of loss (i. e., the economic risk involved in the attempt). We are skeptical of the validity of this general approach, for the issue is not what CBS or copyright proprietors perceive their respective risks to be, but whether CBS has established that its fear that copyright proprietors would in fact attempt to thwart a direct licensing attempt is justified. With that caveat, we turn to the relevant evidence.

It is true, as CBS relentlessly emphasizes, that most of the writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket licensing system. The preference is no surprise in view of the fact that the blanket license is the only way in which performance rights have been marketed to television networks for nearly thirty years. Moreover, the writer-publisher testimony establishes that, from their standpoint, the system is trouble-free and self-executing and the financial rewards are satisfactory. None of them expressed the wish to exchange their present, relatively uncomplicated way of doing business for what they viewed as a new mode involving unfamiliar procedures and possible financial uncertainty.

CBS stresses selected portions of the deposition testimony of several publisher witnesses who expressed them-

selves vigorously when asked to comment on such questions as the possible prohibition of the blanket licensing system. Several common themes pervade the portions of their testimony which CBS stresses: the recognition that there is a large number of publishers and writers who would be competing for exposure on the CBS network; that many of them might face financial difficulties as a result of possible intense competition in a very limited market; and the strong preference for licensing through ASCAP and BMI, which have a measure of bargaining clout in dealing with CBS, the world's largest "consumer" of music.

We may agree that the cited testimony proves that writers and publishers prefer the present system and are apprehensive of dealing directly with CBS. However, this by no means proves the obverse: that copyright owners would refuse to deal with CBS if it discontinued its blanket license and insisted upon dealing on a direct licensing basis. Indeed, the snippets of testimony on which CBS relies are replete with the Darwinian imagery of cutthroat competition among hungry publishers and writers seeking network exposure. The colorful deposition testimony of Leon Brettler, an officer of Shapiro, Bernstein, Inc., is an example:

> "Q Do you think that there would be a good deal of price cutting by publishers in the licensing of performance rights to television networks?
>
> ". . .
>
> A In this case I haven't got the slightest hesitation of saying not that I know, but I am virtually positive there would be a deluge of price cutting bordering on the cutthroat nature that would lead to mutual self-annihilation.

* * *

> "I mean among us competitors who would be so desperate and jockeying for position, none of us having any strength, dealing with one huge user or an industry that is a huge user, consisting of three main entities and we only have those three doors open to us and all 4000 of us converging through that door, I think there would be tremendous amounts of concessions and price cutting and deals." (Dep. 295-98)
>
> * * *
>
> "I think that it would have substantial impact across the board, even to the big companies . . . the largest music publisher is still David compared to the Goliath of the television industry. The so-called top ten are still Davids compared to Goliath and the only time that I have ever heard of David whipping Goliath was in the Bible. Usually Goliath swamps David." (Dep. 302-03)

We do not view this testimony as aiding CBS' case. It tends rather to establish that copyright owners would line up at CBS' door if direct dealing were the only avenue to fame and fortune.

More significant, however, is the fact that, when read in their entirety, the depositions take on an entirely different hue. For example, Brettler testified that "there is no question of the fact that we would negotiate something" if a producer requested performance rights (Dep. 184-85), and that "hordes" of other publishers would do the same. (Dep. 304-05) Edwin H. Morris, who operates another publishing company, expressed anxiety similar to Brettler's. However, far from stating that he would not deal with CBS, he testified:

"Q Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog. Do you talk to these people?

A Yes.

Q Do you invite them to come into your office?

A I will even go to theirs." (Dep. 211-12)

The conclusion that CBS has failed to prove that the "disinclination" of writers and publishers to leave the blanket system would ripen into a refusal to deal directly is fortified by the trial testimony. Although most of the writers and publishers who testified expressed concern similar to those of CBS' deposition witnesses,[14] all but one of them testified that he or his company would negotiate directly with CBS for performance rights, and most of them believed that their attitudes were representative of others in their position. For example, Arnold Broido, President of the Theodore Presser Company, testified:

"Q * * *

"Let us suppose there came a time when CBS no longer held licenses from ASCAP and BMI and came to you to negotiate or seeking to negotiate direct licenses with you for public performance of compositions in your repertory.

What would be your reaction?

A We would deal with them, of course.

Q Would you tell us why?

A Well, there is really very little else that we could do. We would have no choice in the matter.

14. We note in passing that only one of the four deponents on whose testimony CBS relies in support of the "disinclination" issue was called by CBS to testify at trial.

> We would regret it because, obviously, it would be an inconvenience to us and we would regret the breaking of the relationship but we would deal with them." (Tr. 3492-93).

Broido also stated that:

> "the publishers would by and large talk with CBS or anyone else who came to them." (Tr. 3498)

Salvatore Chiantia, President of the Music Division of MCA, Inc., testified:

> "My primary responsibility is to get my music played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I am going to go. I am not going to sit back and say, I hope you fail. I want you to use my music and I am going to try to to make it work." (Tr. 2957)
>
> "There are only three games in town. I have to play one of three games. If we are talking about television, there are only three games in town. If I am effectively cut out from one, I only have two more to play with." (Tr. 2947)

The response of the composers who testified was similar to that of the publisher witnesses. For example, the dean of American composers, Aaron Copland, expressed reluctance to change the blanket arrangement, but testified that he would engage in direct dealing if necessary:

> "Q Now, it has been suggested in this lawsuit that in the event that the Columbia Broadcasting System Television Network for some reason or another no longer held a license from ASCAP and BMI it might come to you, as an individual copyright proprietor, as an individual composer, and seek a license from you

for the right to perform your copyrighted work or works.

I would like to ask you, sir, whether if someone from Columbia came to see you you would be inclined or disinclined to deal with them or what would your reaction be?

A Well, I think I would be rather regretful about the need to individually concern myself with the licensing of a particular work, since the present arrangement takes care of a great many of those chores, as I would think of them, and it seems a comfortable arrangement as it now exists, from our standpoint at any rate.

Q If, however, the question were squarely put to you, will you deal with CBS or will you refuse to deal with CBS, what would your answer be?

A Well, I think my answer would be that of most composers. If they want to get a performance, they will do what is necessary to get the performance and if they have to deal with CBS, they would, I suppose, agree to deal with them." (Tr. 3485-86)

Composer John Green testified to the same effect:

"Q Mr. Green, suppose the following hypothesis. That CBS canceled its ASCAP blanket license and NBC and ABC continued to hold blanket licenses from ASCAP and suppose that either CBS or a producer of a CBS film series show came to you and sought to engage you to write the background and theme music for the show.

Would you be inclined or disinclined to negotiate with him for the writing of that music?

A I would be inclined to negotiate with him.

Q Do you have an opinion as to whether other background writers and composers would be inclined

or disinclined to negotiate with CBS or its producers in that situation?

• • •

Q Do you have an opinion?

A I know how I would like to answer that question. I don't have an opinion but I would be surprised if they didn't feel exactly as I do.

• • •

Q Mr. Green, can you tell us why you would be inclined to negotiate with CBS or the producer of the CBS show in that situation?

A For the following reasons. I like to think that part of my motivation is aesthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.

I like to hear it performed and I like to get paid for hearing it performed and you referred to [CBS]—would I be inclined to negotiate with [CBS] for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it.

Q Mr. Green, you have also told us that in addition to your work as a background composer you have written songs in your music career.

Suppose in that situation we posited just a moment ago, CBS canceling its ASCAP license, suppose one of your publishers called you up and told you that the producer of a CBS variety show is interested in using one of your compositions, one of your songs, on a show, and he asked you for your opinion or view, would you

be inclined to recommend that he license or negotiate with CBS or the producer or would you recommend that he not negotiate with CBS or its producer?

A I would recommend that he negotiate.

Q And why?

A Because I would want my song to be exposed and I would also want to derive the revenue that would come from such a source as [CBS] for that exposure." (Tr. 3457-60)

Perhaps it is not surprising that Walter Dean, who was called by CBS, was the only witness to testify that the publishers for whom he worked would probably refuse to grant licenses to CBS. The publishers are April and Blackwood, companies which CBS owns, and whose catalogs consist mostly of copyrights owned by CBS as well.

Although the testimony of the writer and publisher witnesses persuasively suggested that they would deal directly with CBS, at least *ex necessitate,* our conclusion that CBS has not proven that they would refuse to do so does not rest solely on their testimony. The extensive evidence on the nature of the music industry amply confirms the proposition.

The two most salient features of the television music market are the enormous value to copyright proprietors of network exposure and the markedly limited opportunities for securing it. Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate perform-

ances by other music users. No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music. To that end, publishers regularly direct extensive promotional efforts toward the networks, including the mailing of advance copies of sheet music or recordings to producers, performers and musical directors of television shows. Some publishers use promotional brochures or other written materials; others solicit by telephone. The record establishes beyond doubt that even in what CBS characterizes as a comfortable, blanket license world devoid of price competition, television network performances are highly sought by copyright owners.

The eagerness, and occasional desperation, of copyright proprietors is heightened by the fact that there are so few opportunities to win the prize. There are only three television networks and, as noted earlier, few programs which make appreciable use of previously published music; most programs either use no music at all or "inside" theme and background music published by the producer. The testimony of Alan Shulman, Vice President of the Belwin Mills Publishing Corp., aptly summarizes the situation:

> "Q Are any of your promotional activities aimed at getting your music played on network television?
>
> A Yes. But there are very, very limited number of opportunities to do this. For example, because of the number—well, they are limited pretty much to the variety shows that appear on the television networks and these are fewer in number of recent years than they were previously.

Q Why are your opportunities limited to the various shows?

A Well, because the other shows are basically prerecorded. Prefilmed, et cetera. The series, et cetera, are done and produced beforehand and the music that is performed and synchronized and used in those programs are pretty must [*sic*] controlled by the producers of the particular program.

And these producers, in fact, very often are publishers themselves who control the publishing rights and, naturally, are not too happy to use other people's music unless they absolutely have to because there is income from it." (Tr. 3083-84)

In fact, apart from variety programs, producers seldom "have to" use "other people's music." With rare exceptions, a considerable number of copyrighted songs are suitable for any use a producer might have in mind. Although every copyrighted composition is philosophically or aesthetically "unique" and its uniqueness is dignified by copyright, virtually none of the four million compositions in the ASCAP and BMI repertories is unique in the mind of a television producer. CBS' producer witnesses Wright and Vincent, testified that "any number" of songs would fit a producer's intended use and that "there would always be, obviously, alternates." (Tr. 419, 586) Copyright proprietors are keenly aware that their compositions are substantially interchangeable with the compositions of other writers and publishers, a factor which could well be expected to dissipate any "disinclination" to deal with CBS, which might othewise exist.

Moreover, CBS' enormous power within the music industry supports the testimony of the writers and publishers

who said they would engage in direct licensing. CBS is far more than a television network. It is, as Michael Dann, former Senior Vice President of CBS in charge of programming testified, "The No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music rights." (Tr. 3374) CBS is the largest manufacturer and seller of records and tapes in the world (Tr. 4615); it owns radio and television stations in a number of major metropolitan areas. On CBS' own theory that composers and publishers belong to the race of economic men, it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure. It would risk not only the loss of CBS performance royalties, but royalties from the sale of records sold by CBS subsidiaries and from radio plays of their records on fourteen radio stations operated by CBS in the seven largest cities in the nation.

Moreover, many of the largest publishers are, like April and Blackwood, subsidiaries of large entertainment companies. A number of the named defendants or their parent corporations are program packagers or movie distributors who compete to sell their products to CBS. For example, Famous Music is owned by Paramount and Leeds Music is owned by Universal. The royalties received by these publishing subsidiaries are a small fraction of the amount CBS pays for the program or film. It would be a rhetorical question to ask whether such producers would risk the sale of a program package to CBS because of the disinclination of its publishing subsidiary to engage in direct dealing for the music performance rights.

C. The "3M Incident"

In support of its disinclination theory, CBS also relies heavily on the experience of the Minnesota Mining and Manufacturing Company (3M) which sought direct licenses from publishers in connection with its marketing, in the mid-1960's of a tape and tape player (the M-700 project) designed to provide 24 hours of background music. The M-700 was designed for use in small commercial establishments, such as restaurants, stores, and doctors' and dentists' offices.[15] To this extent, the M-700 was similar to the packages offered by other vendors of background music services such as the well-known Muzak. In one important respect, however, it was different: 3M planned to sell its tape outright, while other vendors leased theirs for a limited term.

3M retained Allen Arrow, an attorney, to negotiate performance licenses for the M-700. Initially, Arrow approached ASCAP for licenses but during the ensuing discussions several problems arose. For example, ASCAP wanted, and 3M did not want, different rates for different classes of users. According to Arrow, ASCAP took the position that the consent decree, which prohibits it from discriminating between similarly situated licensees, barred it from offering a "one class" license because it would discriminate against vendors of background tape systems for larger establishments, such as Muzak and Seeburg. In addition, ASCAP found serious difficulty in 3M's proposal to sell its tape outright because ASCAP would be required,

15. We assume that the 3M project was not designed for the extensive play it has received in federal court.

after the expiration of an initial three year license term, either to try to relicense 3M's customers for a renewal term or, if they refused, to fight a losing battle trying to police possible infringement in a number of small establishments whose individual royalty payments would amount to some $10. per year. Although 3M, as a potential user, was entitled to invoke the licensing and rate-fixing procedures available to it under the consent decree, Arrow testified that 3M chose not to take that course because of time pressures in assembling the project and other such factors. In the circumstances, ASCAP suggested to 3M that it deal directly with copyright proprietors.[16]

There is considerable evidence that the publishers 3M approached viewed the M-700 proposal with some reservations. Some of them were concerned about the novel form of license 3M sought; others about the policing problem; others about the amount of money involved; and still others about the implications of such a proposal for the traditional ASCAP structure and their customary way of doing business. Nevertheless, 3M signed contracts with 27 of the 35 publishers it approached. It obtained all of the music it needed within its time schedule at a cost of about three quarters of the amount of its first offer to ASCAP.[17] Shortly thereafter, 3M began another success-

16. Because 3M was able to license its needs for BMI music from BMI, it did not seek licenses from its affiliates.

17. 3M's first offer to ASCAP was $27. per tape for three years (3M PX 2). ASCAP was asking between $21. and $30. per tape *per year*, or a total of $63. to $90. per tape for the initial license period (3M PX 7). For its direct licenses, 3M paid $21. per tape per year. Thus, it paid $6. less per tape than the amount of its first offer to ASCAP.

ful program to obtain licenses for a second series of M-700 tapes.

Although the statistics do not favor its case, CBS stresses the fact that 3M was able to reach agreement with "only" 27 of the 35 publishers it approached. It argues that a large music user like CBS could be expected to meet considerably greater resistance in a direct licensing effort than 3M, whose rather modest needs for direct licenses could not have threatened to topple the ASCAP structure. Defendants argue, on the other hand, that the 3M incident demonstrates that direct licensing is feasible. It points to the fact that, in the last analysis, 80% of the publishers 3M approached put aside whatever "disinclination" they might otherwise have had to direct dealing, and engaged in business negotiations over a business proposition.

We hesitate to give important weight to the 3M incident as evidence of the likelihood that copyright proprietors would attempt to frustrate CBS' efforts to engage in direct licensing. In the first place, 3M is hardly as large a music user as CBS. Moreover, it sought licenses for a highly fragmented group of small users, rather than for a huge television network. Finally, the form of license which 3M solicited, involving a package of compositions from a publisher for a three year term is not comparable to a license for one performance of a single composition before an audience of millions. In short, CBS and copyright proprietors would be trading for a very different horse than did 3M and the publishers which it approached. Moreover, the evidence as to the 3M incident was developed in large part through documents and deposition testimony;

and included considerable hearsay in the testimony of Allen Arrow. We cannot give significant weight to arguments as to the state of mind (e. g., disinclination) of the publishers approached by 3M based on such evidence. Nevertheless, CBS has made the 3M incident a central part of its disinclination claim. For the reasons set forth below we find that the incident, if it proves anything at all, establishes that copyright proprietors would deal with CBS for direct licenses.

In our view, the bare fact that 8 of 35 publishers were unwilling to sign a contract with 3M has no legal significance; the only relevant question is why they did not. To the extent that the motivations of the unwilling publishers can be gleaned from this record, it appears that general opposition to direct licensing and loyalty to ASCAP played a very small part; and that in general where 3M's proposals were rejected there were legitimate business objections to them. We detail some of these below.

1. *3M's Negotiations With Publishers*

Chappell & Co., Inc. was the first publisher 3M approached. Initially, it found 3M's offer very attractive, but ultimately refused it because of concern that the sale of the M-700 tape would, in effect, put a perpetual free performing right in the hands of 3M's purchasers unless ASCAP licensed and policed those rights. Chappell's concerns appear to have been justified because, as matters turned out, only about a third of 3M's purchasers agreed to pay for licenses to use their tapes after expiration of the initial three year term.

3M next approached MPHC, a publishing company owned by Warner Brothers. MPHC's initial response was favorable, but the MPHC official authorized to make a final agreement was ill, and died during the course of negotiations. By the time he had been replaced, 3M had met its licensing needs. In 1967, 3M negotiated and reached oral agreement with MPHC for licenses covering a subsequent series of tapes, but 3M then decided not to consummate the transaction.

Like Chappell & Co., Famous Music Corp. expressed serious reservations about the possibility of policing the renewal term performance rights, and after consulting ASCAP it rejected 3M's proposal. In 1967, Famous resumed negotiations with 3M for a second tape series and a tentative agreement was reached, but 3M dropped the proposition because at that point it expected to make a bulk licensing agreement with ASCAP covering the second series, which as matters turned out, did not materialize.[18]

The Edwin H. Morris Company did not accept the 3M proposal because it thought, in Morris' words, that 3M was "trying to get something for virtually nothing." (Dep. 131) The evidence establishes that Morris had completely misunderstood the amount of money 3M was actually offering; and that he would have negotiated if there had not been a failure in communication. (Dep. 129-31, 137-41)

Irving Berlin Music, Inc., initially turned down the 3M offer for reasons which are not clear. It appears to have been reluctant to license except through ASCAP, largely

18. However, ASCAP and 3M subsequently reached agreement on a license package for a third series of tapes, the "M-1200".

because 3M proposed to use too small a number of Berlin songs to make a different decision worthwhile. Berlin changed its mind as to the second tape series but again 3M backed out in anticipation of licensing these later tapes through ASCAP.

By the time 3M approached The Richmond Organization it had made sizeable deals with other publishers. Accordingly, it was unwilling to guarantee the use of a sufficiently large number of Richmond songs to make the transaction attractive. Negotiations broke down on that issue. For Richmond, as for other publishers, policing was a problem directly related to the number of songs to be used: above a certain threshold, the cost of relicensing and policing might have become economically worthwhile. For Richmond, that threshold was not reached. Subsequently, Richmond contacted 3M's representative to express its interest in the 3M program, but because 3M wished to use only about 12 Richmond songs, negotiations again fell apart.

In addition to these publishers, 3M failed to conclude agreements with Robbins, Feist & Miller, Bregman, Vocco & Conn, and Frank Music. The first two publishers were the only ones whose reluctance to deal appears to have been motivated from a sense of devotion to ASCAP. Frank Music refused 3M's offer for the initial series of tapes because, like Richmond Brothers, it was concerned about the related problems of policing and the number of tapes to be used. However, it approached 3M to negotiate a license for the second series of tapes and agreement was reached.

We conclude, that, at best, the 3M incident does not favor CBS' case. The publishers which 3M contacted were

offered varying proposals and responded as they thought appropriate to their respective legitimate business interests. Four fifths of them accepted the proposal, the remainder rejected it; and some rejected it the first time around but sought to be included in 3M's second series. The evidence contains no breath of parallel conduct. Those who had fears relating to the problem of relicensing and policing proved to be justified in their fears. Virtually all the publishers responded to 3M's unusual proposal as essentially a clean-cut business proposition; none of them refused entirely to negotiate with 3M. On such a record, no general inference of unwillingness to engage in direct dealing with 3M can be drawn. Even if it could be, it would be unwarranted to impute any such inference to the very different circumstances prevailing in the market for performance rights to music used on CBS.

2. The AGAC Ploy

CBS also stressed the role played by The American Guild of Authors & Composers (AGAC) in the 3M incident in voicing opposition to the issuance of direct licenses by their publishers. AGAC, which is not a party to this action, is a trade association of some 2,400 composers whose traditional concern has been the problems of composers in dealing with their publishers, such as the proper calculation of royalties. About 8% of the writer members of ASCAP and writer-affiliates of BMI are AGAC members. During its 45 year history AGAC has on occasion complained to publishers or to ASCAP and BMI that the interests of its members were not being protected. However, it has never

brought suit against anyone; its principal technique appears to be the enthusiastic use of rhetoric.

AGAC's role in the 3M incident fits this general pattern. Although AGAC responded to the news that publishers had granted licenses to 3M in its typically vociferous way, the actions it took in opposition to the 3M program were untimely and ineffective. 3M started to negotiate with publishers in October, 1964, and by June of 1965 had already licensed the first series of tapes. It was not until November of 1965 that AGAC sent a form letter to publishers protesting that they had failed to secure writer consent for certain songs covered by AGAC contracts and suggesting that publishers refrain from licensing 3M. However, the AGAC letter clearly had no impact on 3M's efforts: it was circulated after licenses had been obtained for the first series, and after the eight publishers who declined the 3M proposal had told 3M of their decision. To this day 3M has continued to obtain licenses for its M-700 series directly from publishers. AGAC has not even attempted to lobby against the practice since 1966.

As CBS points out, a "radical" wing of AGAC which styled itself the West Coast Committee, criticized the AGAC Council for its mild-mannered response to the 3M project, and one of its strident letters appears to advocate a conspiracy by publishers to refuse to deal. However, the central AGAC Council in New York rejected the proposals on the advice of its lawyers.

In sum, CBS has seriously overreacted to the role of AGAC and the West Coast Committee in the 3M incident. Although there is testimony which supports CBS' view that the feelings of some writers run high when talk of direct

licensing is in the air, the significant facts are that AGAC took no effective action against the 3M project and refused to adopt the suggestion of the West Coast Committee that radical action was appropriate. These facts, together with the evidence of AGAC's declining influence over the past ten years, and the strong desire of writers to gain exposure for their work do not support any inference that AGAC would or could take effective action against a direct licensing effort by CBS.

D. The "Music in the Can" Problem

1. The Significance of "Music in the Can"

Television programs or movies which have been filmed or taped are said to be "in the can." Music recorded on the soundtrack of such films or tapes is called "music in the can." At any given time, CBS has a large inventory of programs or feature films, much of which it will rerun over the network. CBS argues that if it cancelled its blanket license, the proprietors of compositions in the can, knowing that the music could not practicably be removed from the soundtrack, would exact premium prices for performance licenses: CBS would be forced to pay these premiums or risk infringement litigation.

CBS claims that by virtue of their leverage, copyright owners of music in the can could easily thwart any direct licensing attempt; and this fact accounts for the "business judgment of the [CBS] management that an attempted by-pass of ASCAP is not a realistic alternative . . ." (CBS Proposed Findings at 60-61). We disagree with CBS'

analysis. Putting aside the fact, noted earlier, that CBS does not appear to have considered the feasibility of direct licensing prior to this suit, evidence of the ease or difficulty with which the antitrust laws may be violated cannot be equated to proof that the violation will occur.

Indeed, even if CBS had proven that some copyright owners would attempt to extract a premium price for their music in the can, that fact alone would not, absent proof of parallel conduct, tend to establish that defendants have violated the antitrust laws. At any point in the normal course of its business, CBS has a sizeable inventory whose make-up is continuously shifting from one season to the next as old programs and films are "retired" and new ones replace them. CBS obviously knew, when it accumulated its current inventory[19] that some form of performance license would ultimately be necessary for the second runs of the programs and films within it. These circumstances, however, do not result from the fact that CBS has continuously taken a blanket license, by "compulsion" or otherwise. To the contrary, they flow from the networks' practice of rerunning films and programs. Regardless what system of licensing CBS uses, its inventory would be vulnerable to "hold-ups" every time CBS puts music in the can without obtaining performance rights for future runs of the program in question. The fact that CBS has failed to secure such rights for reruns of the present inventory is hardly the defendants' fault. No defendant has ever refused CBS a license for any music in the can or out, if for no other reason than that CBS has never asked.

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19. We note in passing that CBS acquired most of its in the can inventory after the commencement of this action (AX 326).

In sum, *any* changeover to direct licensing, even in a world of complaisant composers and publishers equipped with sturdy "machinery" may subject the CBS inventory to hold-ups by the greedy ones among them. However, simple greed, independently expressed, does not constitute a restraint of trade.

In any event, CBS has not proven that its fears of a "hold-up" by copyright proprietors are justified. CBS' principal witnesses in support of its "in the can" theory were its Vice President in charge of business affairs and planning, Donald Sipes, and its economist, Franklin Fischer. Neither of them has ever met a copyright proprietor, nor is either more than cursorily acquainted with the music licensing field. As was true of their testimony on "disinclination," the basis for their conclusion that copyright owners would "hold-up" CBS for rights to music in the can was that it would be economically rational for them to do so (see, e. g., Tr. 1686-87). Even taken alone this is not persuasive evidence, and it is clearly outweighed by the more concrete proof offered by defendants. For example, Albert Berman of the Harry Fox Agency testified that television producers often prepare programs without synchronization licenses and negotiate such licenses *after* the programs are in the can without being "held up."

> "A . . . There is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.
>
> Q Do you have any opinion as to what the basis is for that confidence?
>
> A The basis is that the users and providers of music have to live together. Nobody wants to lock

himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action." (Tr. 981a-82)

Moreover, although we need not reiterate at length the basis of our earlier conclusion that no copyright proprietors would wish to fall into CBS' disfavor, the publishers who testified as to the "in the can" problem confirmed that view. Their statements on the point were highly persuasive. For example, Salvatore Chiantia of MCA Music, Inc. testified as follows:

"A . . . I believe the question here is whether a music publisher would take advantage—let us discard the term holding up—whether a music publisher would take advantage of a situation in which something has already been recorded and a license is subsequently sought.

There have been any number of occasions when that has arisen in the licensing of mechanical reproduction and in the licensing of motion pictures, theatrical motion pictures.

Very often, a theatrical motion picture will be made and the song recorded and the synchronization license is subsequently sought. In those cases, speaking for MCA, we have never held up anybody. We have never been unreasonable. We have licensed.

In the cases of mechanical reproductions, there are cases in which recording companies actually record a song before ever asking for a license. In those cases we would certainly hold them up if we wanted to, but we don't because it would be bad business practice.

There are some people in our business who make a habit of being unreasonable. There are a number of people. You mentioned Happy Birthday before. There

is another very famous person with whom I have done a great deal of business, who lives in Paris, who makes my life miserable because she refuses to allow me to license under certain circumstances.

Well, those people are generally identified and people watch for them. Certainly in my business of being a music publisher I don't know of any company that has ever had to say, 'Watch out for Chiantia or MCA; they'll get you.'

We know that we are in this business and we intend to stay in this business and the way we stay in the business is by establishing some kind of a rapport and good will with our users and customers.

* * *

We want the door to remain open for us and if you start holding up record companies or the people with whom you do business, you are in real trouble." (Tr. 2895-98)

Even assuming, contrary to the evidence, that some publishers would be drunk with power at having CBS on the spot, CBS has overstated the dimensions of the problem. Most of its inventory is comprised of theatrical motion pictures (i. e., movies), most of whose music is theme and background music controlled by the film producer's affiliated publishing company (PX 994, AX 287, BX 167). The "problem" of licensing this music is similar to the problem of licensing the "inside" theme and background music for CBS' regular television programming: it can be obtained from the producer itself. Of course, the producer *could* hold out for a large premium, but only on pain of losing large sales of his principal product, movies, to one of only three potential network buyers. It does not need to be

repeated that the price of music performance rights is a tiny fraction of the price of a program or film.

Most of the remainder of CBS' in the can inventory is regular programming which is often rerun in the course of a season. As discussed earlier, most of CBS' serials use only theme and background music owned by an inside publisher. The factors just described as to movies in the can apply equally to other programs in the can.

Unfortunately, CBS has not offered evidence regarding the average life span of a given inventory of programs and films (or of categories of such programs and films), or the portion of the inventory which it actually intends to rerun. The absence of such evidence renders the "in the can" argument even less acceptable. For example, it may be that some television serials have a basic life of one year; if so, that portion of the inventory would be "consumed" during the inevitable interval between CBS' notice of termination of its blanket license and the date on which it actually commenced direct licensing for all its needs. For these programs, as well as the programs or films which CBS does not intend to rerun, there would be no "in the can" problem because there would be no need for performance licenses.

2. Commercials "in the Can"

CBS also claims that television commercials containing copyrighted music present a similar "in the can" problem. Advertising agencies do not ordinarily purchase performance licenses for the music they use. Instead they get a free ride on the networks' blanket licenses. Accordingly, CBS argues that if it cancelled its blanket license, a number of commercials "in the can" could not be used unless either

the advertising agency or CBS paid the premium license fee which CBS feels sure would be exacted. The claim is without merit. Only a fraction of television commercials use music at all. (AX 263, AX 264) In those which do, the copyright proprietor is normally the advertiser on whose behalf the music was made. As Paul Marks, ASCAP's Director of Operations testified, "most of the commercials use music that is written directly for those commercials, [by an 'inside' composer] and in the overwhelming majority of cases, almost all the cases, the writer grants all rights to the sponsor or the advertising agency and makes no reservation of any rights to receive ASCAP distributions." (Tr. 2548) Of course, the sponsor or the advertising agency is the last person who might be expected to hold up CBS for licenses to use the music in its commercials.

A minimal number of commercials use previously published music for which CBS or the advertising agency would have to obtain a performance license from an "outside" publisher. For example, of the 1300 commercials created by the J. Walter Thompson Advertising Agency in 1972, only 21 used copyrighted music (AX 263, AX 264), or less than 2%. As to this miniscule percentage, it is worth repeating that few music publishers would hold up CBS or the world's largest advertising agency for a premium if they hoped to have their music used in preference to that of another publisher. Indeed, because commercials have a normal life span of six to eighteen months (Tr. 1873) CBS might well avoid any problem otherwise posed by "commercials" in the can simply by giving reasonable notice of the cancellation of its blanket license: most of the commercials in question would have run their short life before CBS commenced a direct licensing system.

X.

A Word About Per-Program Licenses

As outlined earlier, CBS concedes that it could license the music for most of its entertainment programs without difficulty by requiring the program packager to deliver performance rights together with the rest of the package. A substantial portion of CBS' other programming, such as news and public affairs programs, makes little or no use of previously published music. As to these two large categories, therefore, CBS could license the music used on an other-than-blanket basis. The programs which make by far the heaviest use of "outside" published music are weekly variety shows and variety specials, late-night talk shows, and the "Captain Kangaroo Show," which in the aggregate comprise a very small portion of CBS' program schedule. Assuming, contrary to the evidence, that the changeover to direct licensing would necessarily meet with mechanical problems until the "machinery" was properly oiled and adjusted, such problems would be acute only in relation to the few shows, such as variety shows, which regularly use music of outside publishers and are produced on short production schedules. For such shows, where speed and efficiency in clearing performance rights may be at a premium, a per-program license, which the consent decrees require ASCAP and BMI to offer, could be a logical alternative. Such a license gives the user unlimited access to the entire repertory, but requires him to pay only with respect to programs which actually use ASCAP (or BMI) music.

Although CBS has never sought to negotiate with ASCAP or BMI for a per-program license, it argues that such a license is not a feasible alternative. The argument is based on the assumption that the provisions of the per-program license negotiated between ASCAP and an All Industry Committee of owners of local television stations would be imported wholesale into any per-program license for network television use. (CBS Proposed Findings at 108-09) The local television license form provides that the station can avoid paying a per-program license fee for certain uses (e. g., motion pictures) only by obtaining direct licenses for all of the music contained in the program and by giving ASCAP seven days' notice of the direct license. CBS claims that such a license would not meet its needs because of the possibility that for a given variety program it might be successful in obtaining direct licenses for, say, only 90% of the music it needs, but would still need to purchase a per-program license at the full rate to cover the remaining 10%.

The argument overlooks several critical facts. CBS is of course not bound to agree to the terms of the local station per-program license, nor may ASCAP or BMI insist on any particular terms. To the contrary, they are required by the respective consent decrees to offer per-program licenses on terms which are justified by applicable business factors[20] and which give the user a genuine choice between it and other forms of license, such as the blanket license. Because CBS has never sought to negotiate a per-program license, there is no way to know what its

20. See notes 3 and 5, *supra*.

terms might be. For example, there is no legal obstacle and no evidence of an unmanageable factual obstacle which would prevent it from bargaining for a license which gave it "credit" (i. e., a reduced rate) where it had obtained direct licenses for part of the music to be performed on the program in question. Indeed, because the decrees enjoin ASCAP and BMI from interfering with the direct licensing of compositions,[21] on the face of it, it would appear that CBS could argue in consent decree proceedings, if necessary, that ASCAP and BMI are required to offer a per-program license whose price is reduced to reflect the number of direct licenses obtained for the program. In view of these facts CBS' claim that the per-program license is not suitable for its needs is, at best, premature. Indeed, because CBS makes heavy use of "outside" music on very few programs, there appears to be no reason why CBS could not feasibly turn to a combination of direct licenses, for shows using inside music or outside music of the one or two publishers; and per-program licenses, for those programs on which it makes heavy use of outside music.

XI.

Summary of Findings

On review of the record, we conclude that CBS has not met its burden of proving that defendants illegally restrain trade in the market for performance rights for network television use, and compel it to take a blanket license as alleged in the complaint. CBS has failed to prove that there are significant mechanical obstacles to direct licens-

21. See note 4, *supra;* CX 3.

ing. Nor has it established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.

Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude under a direct licensing system, it is clear on this record that any resistance they might manifest would quickly dissolve, and that CBS could easily fill its music needs in the meantime. The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur.

We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem. The risks which CBS claims are posed by direct licensing realistically exist only if CBS ignores its own axioms about "reasonably prudent" network managers (e. g., CBS Post-Trial Brief at 33. 36) and abruptly cancels its blanket license. There is little question that if CBS took such a course, its licensing efforts would produce temporary confusion and disarray. However, the taking of such a voluntary "risk" cannot itself act as a

predicate for defendants' antitrust liability. Conversely, and more significant, CBS has considerable control over the degree of risk which a direct licensing attempt would involve. Assuming a reasonable period of preparation prior to the commencement of full-scale direct licensing, there are a number of steps CBS could take to assure the success of its efforts, particularly given its leverage with program packagers and, by extensions, with their publishing subsidiaries. For example, prior to cancellation of its blanket license, CBS might negotiate with the producers of its programs and films using "inside" music to secure favorable prices for licenses for music "in the can," and for music contained in new programs to be shown in the upcoming season; it could build up a large reservoir of music by requiring program packagers affiliated with major publishers to make their catalogs available for direct licensing in accordance with a fee schedule; it could negotiate with independent publishers for either "mini-blanket" licenses covering their catalogs or direct licenses using a fee schedule; it could send notices to all publishers of its intention to seek direct licenses for compositions in their catalogs; it could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing that, it could bring proceedings under the consent decree.

There is an astonishing lack of evidence that CBS considered such possibilities, or even the feasibility of direct licensing as a general proposition before commencing suit. The fact that it did not do so does not in itself defeat its claims, but it has rendered the nature of its proof at trial largely speculative. CBS' evidence was

for the most part addressed to such abstract issues as "disinclination," and brought out through the generous use of hypothetical questions. However, it is proof of the threat of actual anticompetitive conduct, not possible "disinclination" which violates the antitrust laws. CBS might have obtained such proof by attempting to negotiate direct licenses. The proof which it chose to offer instead, as to the alleged fear or disinclination of copyright proprietors to engage in direct dealing, is not sufficient to establish an illegal restraint of trade. Such evidence does not prove that CBS needs, as it claims, the "signal" of a judgment in this suit to bring about a direct licensing system; it indicates rather that CBS has the power to give a clearly audible signal itself.

XII.

Conclusions of Law

As stated early in this opinion, the pre-trial order specified the following issues:

> "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;
>
> (ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

The conclusion which inescapably follows from the evidence outlined in the body of the opinion is that CBS has failed to establish that defendants' conduct constitutes an actionable restraint and compels CBS to take a blanket

license. The complaint alleges that defendants' acts and practices in licensing performance rights for network use constitute several distinct violations of the antitrust laws. Because CBS has failed to prove the factual predicate of its claims—the non-availability of alternatives to the blanket license—the complaint must be dismissed. We detail our conclusions of law below.

1. The claim that members and affiliates of ASCAP and BMI have illegally combined to eliminate price competition among themselves must be dismissed because CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them.

2. The claim that members and affiliates of ASCAP and BMI have combined to fix the price at which CBS must license performance rights by licensing those rights only in a package must be dismissed because CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. To the contrary, the record establishes that CBS has always negotiated the price for its licenses with ASCAP and BMI.[22] Moreover, CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license.

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22. We note, moreover, that contrary to CBS' claim that the blanket license fee is unrelated to the extent of the networks' use of music, the only evidence on the point indicates that the extent of CBS' music usage has always been a significant factor in negotiations for the fee paid on renewals of CBS' blanket license. (Tr. 3611, 3870-72).

3. The claim that ASCAP and BMI have conditioned the licensing to CBS of music that it wishes to use upon the licensing of music it does not wish to use must be dismissed because CBS has failed to establish (a) that there were two separate and distinct "products" (i. e., groups of compositions, of which CBS wanted to purchase only one); (b) that CBS negotiated with ASCAP or BMI to license only the "wanted" compositions; and (c) that ASCAP and BMI refused to negotiate on that basis and had to coerce CBS to license the "unwanted" compositions as a condition of licensing the "wanted" compositions.[22]

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23. In its post-trial reply brief CBS raises a new and somewhat puzzling variation of its claim that ASCAP and BMI are guilty of imposing unlawful tie-ins. CBS points out that ASCAP and BMI offer their members the services of monitoring and policing music uses and collection and distribution of royalties, and claims that neither organization offers such services to any user of music, such as CBS, "*unless* the user accepts a blanket license; and offers none to any member *unless* that member sells through the blanket license" (CBS Reply Brief at 14, emphasis in original). The claim is without merit. As to the first branch of the argument—that ASCAP and BMI condition the sale of their "auxiliary" services to CBS on its purchase of a blanket license, CBS cannot have been the victim of a tie-in because it has never purchased such services; only members and affiliates of ASCAP and BMI have done so. If CBS' claim is construed more charitably to be that ASCAP and BMI would refuse to sell such services to CBS (which CBS could use to induce copyright proprietors to engage in direct dealing) *unless* CBS also purchased a blanket license, the claim still fails as a matter of law: CBS has never sought to purchase "only" services, and there is no evidence that if it did so ASCAP and BMI would condition their sale on the purchase of a license CBS does not want.

The claim that ASCAP and BMI condition the sale to their members and affiliates of their services as licensing agents on their "purchase" (through administrative charges against royalty distributions) of auxiliary services such as monitoring is also without merit. CBS has no standing to assert such a claim because the member or affiliate, rather than CBS, is the alleged victim of the tie. Putting aside the

(footnote continued on next page)

4. The claim that ASCAP members and BMI affiliates are guilty of a group boycott by forming the ASCAP and BMI music pools and authorizing their licensing agents to license only on terms that foreclose CBS from dealing directly with copyright owners must be dismissed because CBS has failed to prove that the licensing authority of ASCAP and BMI is limited to such terms, is exclusive in fact or that copyright owners have refused or would refuse to deal with CBS directly on an individual basis.

5. The claim that ASCAP members and BMI affiliates are guilty of copyright misuse must be dismissed because CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license.

---

conceptual difficulties presented by CBS' position, there is no evidence that ASCAP and BMI have refused or would refuse to monitor uses and collect royalties on behalf of members and affiliates who engaged in direct negotiations and wished to have the convenience which a central agency offers. To the contrary, there is every reason to believe that ASCAP and BMI would want to preserve this branch of their business even if they were forced to forego the issuance of blanket licenses. In addition, there is no evidence that if necessary copyright proprietors would not readily forego such services to have their compositions performed on CBS. Copyright proprietors certainly do not indispensably need ASCAP or BMI to perform the function of collecting their royalties: the producer using the music would simply remit payment to the proprietor, or to Harry Fox or a similar organization. Nor does it appear that however convenient the present arrangement may be, the producer is indispensably dependent on ASCAP and BMI to monitor possible infringements by a large television network which performs music before millions of viewers; certainly CBS cannot be expected to argue the contrary.

6. The claim that defendants are guilty of monopolization, both attempted and achieved, must be dismissed. The offense of monopolization consists of two elements: possession of monopoly power in the relevant market and willful acquisition or maintenance of that power as distinct from growth as a consequence of a superior product or historical accident. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Attempted monopolization is established by a showing of specific intent to monopolize with a "dangerous probability" of succeeding. *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *Swift & Co.* v. *United States,* 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518 (1905). CBS has failed to prove these elements.

To begin with, we disagree with CBS' argument that the relevant market is the market for BMI and ASCAP blanket licenses. The proposition is based on a factual premise which is rebutted by the evidence: that blanket licenses are the sole method for securing performance rights. Manifestly, ASCAP and BMI are not the sole source of the performance rights CBS needs; they are merely the sole source of the blanket licenses which CBS does not want. A market whose only product CBS does not want to purchase cannot by definition, be a relevant market, and the monopolization of a market in which CBS does not want to buy (and in which, of course, it need not buy) cannot injure it.

The relevant market is the market for performance rights to compositions suitable for television network use. The classic test for determining the relevant market in suits brought under §2 of the Sherman Act is whether

products are "reasonably interchangeable by consumers for the same purposes." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). Products are said to be interchangeable when they can be used for the same purpose, and when a purchaser is willing to substitute one for the other. *United States* v. *Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 (E.D.N.Y. 1965, Mishler, J.). It is evident (indeed it is CBS' premise in this suit) that a bundle of direct licenses for network performances, acquired on an individual transaction basis, is interchangeable with a blanket license permitting the use of exactly the same music. Moreover, because the evidence establishes that musical compositions are fungible, a virtually unlimited number of *combinations* of compositions (i. e., bundles of licenses negotiated on a direct basis) sufficient for CBS' music needs would be readily interchangeable with a blanket license. Accordingly, the relevant market includes *all* sellers of performance licenses for network use, including ASCAP and BMI, as sellers of blanket licenses, and individual copyright proprietors, as sellers of "direct" licenses.

CBS has not proven that ASCAP or BMI possesses, or has attempted to achieve monopoly power in the market for performance rights for network use. In *United States* v. *Grinnell Corp., supra,* 384 U.S. at 571, 86 S.Ct. at 1704, and *United States* v. *E. I. duPont de Nemours & Co., supra,* 351 U.S. at 391, 76 S.Ct. at 1005, the court defined "monopoly power" as the "power to control prices or exclude competition." CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright pro-

prietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place. Indeed, as noted earlier, the power of ASCAP and BMI to control the price even of their own blanket or per-program licenses is sharply curtailed under the decrees.

Nor does ASCAP or BMI have the power to exclude competition: there is a high degree of interchangeability among compositions, and performance rights to any given type of composition are available from a number of sources if CBS chooses to tap them. In addition to the choice of a blanket license or a per-program license from ASCAP or BMI for any given type or group of compositions, any composition (or combination of compositions) or its practical equivalent could be licensed from several individual copyright proprietors.

Finally, there is no substantial evidence that ASCAP and BMI have attempted to monopolize the market for performance rights for network use. Although at present they are the sole suppliers of CBS' music needs, such a state of affairs has resulted not from any violation of the antitrust laws but because CBS has, since the advent of television, found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent. The fact that CBS now wishes to change its long standing business practices does not, without more, convert defendants into monopolists.

CBS has failed to prove that any activities of ASCAP and BMI and their members and affiliates threaten it "with loss or damage by reason of any violation of the antitrust

laws'' within the meaning of §16 of the Clayton Act. Even assuming, contrary to the evidence, that CBS has established the possibility of an impending violation on the part of some individual defendants, it has not established the threat of loss or damage sufficiently to warrant the grant of an injunction against the issuance of blanket licenses to any television network, or establishing its proposed ''per-use'' system.

The foregoing constitutes our findings of fact and conclusions of law. The complaint is dismissed.

It is so ordered.

APPENDIX F

JUDGMENT OF THE COURT OF APPEALS SOUGHT TO BE REVIEWED

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of April, one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. LEONARD P. MOORE
HON. JON O. NEWMAN
Circuit Judges.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff-Appellant* v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., *Defendants-Appellees.*	75-7600

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

April 3, 1980

by: Arthur Heller,
Deputy Clerk

APPENDIX G

ORDERS OF THE COURT OF APPEALS DENYING CBS's PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

APPENDIX G

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of June, one thousand nine hundred and eighty.

Present:

HON. JON O. NEWMAN
HON. J. EDWARD LOMBARD
HON. LEONARD P. MOORE
Circuit Judges

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff-Appellant,* v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., *Defendants-Appellees.*	75-7600

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

June 2, 1980

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June, one thousand nine hundred and eighty.

Present:

HON. IRVING R. KAUFMAN, Chief Judge
HON. J. EDWARD LUMBARD
HON. LEONARD P. MOORE
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
HON. JON O. NEWMAN
HON. AMALYA L. KEARSE,
Circuit Judges

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff-Appellant,* v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., *Defendants-Appellees.*	75-7600

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by

counsel for the plaintiff-appellant, and no active judge or judge who was a member of the panel having requested that a poll be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge Kaufman and Judge Kearse took no part in the consideration of the question whether to grant rehearing en banc.

June 2, 1980

A. DANIEL FUSARO,
Clerk

APPENDIX H

BRIEF OF THE UNITED STATES SUBMITTED (ON REMAND) TO THE COURT OF APPEALS

CBS v. ASCAP

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, *et. al.*,
Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, *et al.*,
Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

ISSUES PRESENTED

I. The primary issue in this case is whether the method by which ASCAP and BMI license their respective pools of copyrighted musical compositions to the television networks under a blanket license constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act.

Subsidiary issues are:

II. Whether the record is adequate to make this determination.

III. If the record is inadequate, what should be the disposition of the case.

IV. If the current blanket license is found on this record to be unlawful as to the television networks, whether the license necessarily is unlawful as to other licensees of non-dramatic musical performance rights.

V. If the current blanket license is unlawful, whether it would be equally unlawful for ASCAP and BMI to license individual compositions based on prices determined by the copyright owners.

STATEMENT

Background

ASCAP is an unincorporated membership association comprising some 22,000 authors and publishers who own copyrights in musical compositions. *CBS* v. *ASCAP*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975). It was formed as a clearinghouse in 1914 to solve existing problems in the licensing of rights to perform, for profit, musical works. *Id.* at 741. For its members, it secures payment for their copyrights and detects unauthorized uses of copyrighted music; for users, it makes licensing and indemnification against infringement readily available. Members grant to ASCAP the non-exclusive right to license their works. ASCAP, in turn, issues to users a "blanket"[1] license to its entire repertory, which includes more than three million compositions. *Id.* at 742.

[1] The term "blanket" license contemplates the right to use any or all compositions in the repertory, as often as desired, for the term of the license. 400 F. Supp. at 742.

BMI was organized in 1939 by radio broadcasters, and it remains broadcaster-owned. It is affiliated with some 10,000 publishers and 20,000 writers whose musical works are licensed by BMI through blanket licenses similar to ASCAP's. BMI's repertory includes about one million works. Virtually every domestic copyrighted musical composition is in the repertory of either ASCAP or BMI. *Ibid.*

The licensing activities of ASCAP and BMI are regulated by consent decrees.[2] Under the terms of consent decrees entered in *United States* v. *ASCAP*, 1950-1951 CCH Trade Cas. § 62,595 (S.D.N.Y. 1950), ASCAP is required to "grant to any user making written application therefor a nonexclusive license to perform all of the compositions in the ASCAP repertory" (Para. VI). Members retain the right to license their works individually as well (Para. IV(B)). The decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the copyright owner cannot be located within 30 days (Para. VI).

The decree permits ASCAP and licensees to negotiate any fee and any form of blanket license on which they can agree. It provides, however, that ASCAP must offer at

[2] The United States recognizes that these decrees do not insulate ASCAP and BMI from antitrust challenges. The decrees are not material to the antitrust analysis of the blanket licenses. Indeed, if the Court finds the network blanket licenses to be unreasonably competitive restraints, it is possible that the form of relief ultimately granted might require modification of the consent decrees. That prospect, however, should not deter the Court from making an independent determination of the legal issues before it.

least a "per program" blanket license,[3] the fee for which would be based on income received for programs in which ASCAP music is played (Para. VII(B)). The fees sought by ASCAP must offer a "genuine economic choice" between per program and other licenses, and ASCAP is restrained from "requiring or influencing the prospective licensee to negotiate for any other type of blanket license prior to negotiating for a per program license" (Para. VII (B)(3), (C)).

On receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply to [the District Court for the Southern District of New York] for the determination of a reasonable fee * * *" (Para. IX(A)). In such a proceeding ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (*id.*).

A consent decree entered in *United States* v. *Broadcast Music, Inc.*, 1966 CCH Trade Cas. ¶ 71,941 (S.D.N.Y. 1966) is similar to the ASCAP decree in requiring BMI to offer alternative forms of fee systems for blanket licenses (Para. VIII(B)). While other provisions of the decree differ from those in the ASCAP Decree,[4] the parties

[3] A "per program" blanket license enables the licensee to use any or all compositions in the repertory, as often as desired, for specified programs of the licensee.

[4] The BMI decree, for example, does not provide for the district court to set a "reasonable" fee at a user's request. Nor does it expressly reserve to affiliates the right to license their works directly. Only where a user is making a "direct" performance is individual negotiation reserved (Para. IV(A)). In view of the basic similarities of the

stipulated that CBS could license directly from BMI affiliates with the same ease or difficulty as from ASCAP members. 400 F. Supp. at 751.

Since 1946 CBS and the other television networks continuously have taken blanket licenses from ASCAP and BMI. The fees under these licenses have been based on a percentage of the networks' total revenues or a flat fee and do not depend on the amount or distribution of music use. Until this suit was filed in December 1969, CBS never had sought any other form of license from ASCAP, BMI, or their members. *Id.* at 743, 752-753.

These Proceedings

CBS, one of the three national television networks, brought this action to challenge the method by which ASCAP, BMI, and their members and affiliates license the nondramatic performing rights to their copyrighted musical repertories. *Id.* at 741. CBS charged that the blanket license not keyed to specific songs actually used is unlawful because it "compels" CBS to pay royalties that are not based on actual music use. *Id.* at 745. It argued that the pooling of licensing rights and the issuance of a blanket license constituted price fixing, unlawful tying, a concerted refusal to deal, and monopolization prohibited by Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2, and that these practices also constitute copyright misuse.

The district court severed liability issues from other issues in the case and, after a trial without jury, dismissed the complaint. After holding that none of the challenged

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two organizations, however, we will hereafter refer only to ASCAP with the understanding that, except as may be noted, our comments apply equally to BMI.

conduct constituted a *per se* violation of the antitrust laws, the district court viewed the dispositive question under both antitrust rule of reason analysis and copyright misuse law as one of compulsion—whether CBS is coerced into taking a blanket license. *Id.* at 747-748, 751.

The court apparently accepted CBS's contention that writers and publishers might be "disinclined" to leave the current blanket licensing system and that users like CBS might be unwilling to risk giving up their blanket licenses in order to pursue direct licensing alternatives. Nonetheless, the court believed that the issue was not what CBS or copyright owners perceived their risks to be, but whether in fact this disinclination by copyright owners to leave the comfort of the current system would actually ripen into a refusal to deal directly when faced with requests by CBS to do so. *Id.* at 768. The court found that it would not, and that CBS thus had failed its burden of proof.

This Court affirmed the dismissal of all antitrust claims save one. *CBS* v. *ASCAP*, 562 F.2d 130 (2d Cir. 1977). A majority of the panel held that "the ASCAP blanket license in its present form is price-fixing," a *per se* violation of Section 1 of the Sherman Act. *Id.* at 140. It recognized what it termed a limited "market necessity defense" to the *per se* rule, but found that, since licensing by direct negotiation was feasible, the blanket license is not "necessary" to the functioning of the market.

While this Court accepted as "not clearly erroneous" the district court's findings that a direct licensing market can exist and that CBS had not proved that there are barriers to direct licensing (*id.* at 141 n.29), it nonetheless found that the very existence of the blanket license dulls

the owners' incentives to compete. *Id.* at 139. It concluded that "[o]ur objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete." *Id.* at 140. In remanding the case to the district court to fashion a remedy, however, the Court suggested that "the blanket license need not be prohibited in all circumstances," since the record did not "compel a finding that the blanket license does not serve a market need for those who . . . deem [it] desirable". *Ibid.*

The Supreme Court reversed (*Broadcast Music, Inc.* v. *CBS*, 99 S. Ct. 1551 (1979)), concluding that the current blanket license is not a *per se* violation of the Sherman Act, but, rather, should be subjected to a more discriminating examination of competitive effects under the rule of reason. The Court noted that application of a "*per se*" label would condemn the challenged license outright. Moreover, contrary to this Court's belief, it stated that a practice *per se* unlawful could not be saved in some applications or for some users. *Id.* at 1560-1561 & n.27. The Court reasoned that the blanket license is not a 'naked restraint[ ] of trade with no purpose except stifling competition' . . . but rather accompanies the integration of sales, monitoring and enforcement against unauthorized copyright use". *Id.* at 1562. Nor is the blanket license a simple horizontal price fixing arrangement because, while "ASCAP does set the price for its blanket license . . . that license is quite different from anything any individual owner could offer. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets". *Id.* at 1564.

While a majority of the Supreme Court voted to remand the case to this Court for a full rule of reason analysis, Mr. Justice Stevens, dissenting, believed that the record established that the "exclusive all-or-nothing blanket license policy violates the rule of reason". *Id.* at 1566.

INTRODUCTION TO ARGUMENT

The legality of the conduct challenged here must be determined under an antitrust rule of reason analysis. The application of the rule of reason requires a careful assessment of the competitive effects of the conduct in question. Deviations from a competitive industry, if any, must be identified. If anticompetitive industry characteristics exist they must be balanced against any procompetitive aspects resulting from the challenged conduct which are not attainable by less anticompetitive means. The outcome of such an analysis obviously is dependent on the facts of the case.

In this brief, we will discuss the factors which we believe are important in assessing the lawfulness of the blanket license under the rule of reason. Since we were not party to the trial proceedings, we have not presumed to review the lengthy trial record with a view toward determining whether the district court's findings satisfy the "clearly erroneous" test. Rather, our analysis of this case is based solely on the prior opinions of the district court, this Court, and the Supreme Court. That analysis indicates, however, for the reasons explained below, that the district court did not consider all of the factors which are relevant in assessing the lawfulness of the blanket

license. This apparent failure by the district court to examine all of the relevant factors may reflect a failure of proof by CBS which is fatal to its rule of reason argument.[5] On the other hand, there may be ample evidence in the record concerning these factors which simply is not reflected in the district court's findings. If ample evidence concerning these factors was presented to the district court, then this Court should either remand the case to the district court for further findings of fact or, if the evidence is sufficiently clear, make the necessary findings itself.

ARGUMENT

I. ADDITIONAL FINDINGS ARE REQUIRED BEFORE THIS COURT CAN DETERMINE WHETHER THE CURRENT FORM OF BLANKET LICENSE OFFERED TO THE TELEVISION NETWORKS IS AN UNREASONABLE RESTRAINT OF TRADE

A. *The Analysis Required by the Rule of Reason*

Although the Sherman Act, read literally, prohibits all multiparty restraints of trade, the Supreme Court has held that it precludes only agreements that are "unrea-

[5] Similarly, if plaintiff demonstrated anticompetitive effects under the blanket license, defendants should lose if they have failed to introduce sufficient evidence to justify their collective practices. On this point, however, one caveat is in order. If the Court should find that any deficiency in defendants' evidence may be attributable to plaintiff's failure clearly to articulate the proper issues under a rule of reason analysis, defendants should not be deprived of the opportunity to adduce evidence relevant to the broadened issues. For example, if plaintiff's case was tried solely in terms of "compulsion" (see, *e.g.*, 400 F. Supp. at 745), defendants may have quite reasonably limited their case to that issue.

sonably restrictive of competitive conditions." *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S.1, 58 (1911); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). There are two complementary analytical methodologies for determining whether an agreement constitutes an unreasonable restraint on competition. "In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.'" *National Society of Professional Engineers*, *supra*, 435 U.S. at 691-692. One activity which falls into this first category of analysis is price-fixing. *Id.* In the second category are "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Ibid.*

This remand follows the Supreme Court's determination that the licensing activities challenged here fall into the second category of antitrust analysis. Thus "price-fixing," which "is a short-hand way of describing certain categories of business behavior to which the *per se* rule has been held applicable" (99 S. Ct. at 1557), is no longer an issue in this case.[6]

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[6] Therefore, with due deference, we question the statement in this Court's order of July 6, 1979, that "the Supreme Court did not rule that price-fixing was not involved." We believe this is precisely what the Supreme Court did rule. 99 S. Ct. at 1557. That ruling does not, of course, preclude a finding, under a rule of reason analysis, that the practices at issue have had an adverse effect on price competition. But that is different from price-fixing, whose *per se* illegality precludes inquiry as to actual competitive effects. Here, by contrast, any anticompetitive effect on pricing must be weighed against any benefits of the collective activity to determine whether, on balance, the effects are anticompetitive; if they are, the activity is unlawful.

Under the rule of reason, the ultimate inquiry is whether a challenged combination is one that promotes competition or suppresses it. *National Society of Professional Engineers, supra*, 435 U.S. at 691. In a joint arrangement which involves the cooperative combination of actual or potential competitors, there is a risk that competition may be unnecessarily reduced. Such a combination, however, may generate substantial efficiencies unobtainable by other means. The *Professional Engineers* test to determine whether the arrangement is lawful is fairly straight forward. It requires a court to measure only the competitive effects attributable to an arrangement, and to determine on balance whether the net effect is to restrain competition.

To assess the competitive effects of the challenged activity the court should ask the following questions: Was the agreement entered into for the illegitimate purpose of limiting competition? If so, an elaborate inquiry into the actual effects of the conduct may be dispensed with for the parties themselves are presumed to have an accurate impression of the likely competitive effects of their actions on the market in which they operate. L. Sullivan, *Handbook of the Law of Antitrust* §71 (1977); See *Chicago Board of Trade* v. *U. S., supra*, 246 U. S. at 238; see also *United States* v. *United States Gypsum Co.*, 438 U. S. 422, nn.13, 21 (1978). Even if the purpose of the conduct was legitimate—to promote trade—the conduct is unlawful if it has the effect of unreasonably restraining trade. Moreover, conduct which initially had a net procompetitive effect may become illegal if the nature of the market or industry has changed so that the original justification no longer fully pertains. Pertinent to ascertaining the net competitive effect of the conduct at issue are the character-

istics of the market in which the challenged activity operates—does the activity in fact promote competition or produce efficiencies; does it produce incentives or disincentives for competitive behavior; do defendants have sufficient market power to enable them to set a supracompetitive price or unreasonably onerous terms? See, *e.g.*, *Standard Oil Co.* v. *U. S.*, *supra*, 221 U. S. at 58; *Chicago Board of Trade*, *supra*, 246 U. S. at 238; *White Motor Co.* v. *U. S.*, 372 U. S. 253 (1963); *Citizen Publishing Co.* v. *U. S.*, 394 U. S. 131, 135 (1969); *National Society of Professional Engineers*, *supra*, 435 U. S. at 690 & n.15; R. Bork, *The Antitrust Paradox* 263-279 (1978); L. Sullivan, *supra*, §104.

If the court concludes that no anticompetitive effects stem from the concerted conduct, there is no need for further inquiry; the conduct is lawful. If the court concludes that the joint activity produces anticompetitive effects and no procompetitive benefits, the conduct is unlawful. But where the practices adopted by the participants to carry out a joint undertaking produce both competitive restraints and benefits the rule of reason analysis must be taken a step further. The court must determine whether the anticompetitive effects outweigh any procompetitive results. If the challenged practices are necessary to produce the resulting procompetitive benefits then all such benefits would be weighed against any anticompetitive effects which are either inherent in the combination itself or result from the practices being challenged. The competitive effects of a joint activity, however, are severable. If a particular practice is not necessary to obtain certain procompetitive effects resulting from the combination, then those procompetitive benefits may not be weighed against the anticompetitive effects of the particular practice. Only those benefits

attributable to the challenged practice may be weighed in the balance. See *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282-283 (6th Cir. 1898), *aff'd* 175 U. S. 211 (1899); *United States* v. *Sealy, Inc.*, 388 U. S. 350, 356 & n.3 (1967); *Citizen Publishing Co.*, 280 F. Supp. 978, 992 (D. Ariz. 1968), *aff'd* 394 U. S. 131 (1969); L. Sullivan, *supra* at 208-209.

Whether a practice reasonably is necessary to secure procompetitive benefits depends on the availability of less restrictive alternatives. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 1979-1 Trade Cas. ¶62,718 at 78,027 (2d Cir. 1979). When a less restrictive alternative is available, the use of a more restrictive practice cannot be deemed necessary to achieve the procompetitive benefits. At the time of formation of the joint activity, the parties involved must take reasonable steps to determine whether such less restrictive alternatives are available to achieve procompetitive effects. Moreover, the necessity of a practice should be evaluated throughout the life of the combination, and if it becomes apparent that less restrictive alternatives are available to achieve the benefits, then the more restrictive practice should no longer be deemed "necessary."

B. *Application of a Rule of Reason Analysis to this Case in View of the Prior Findings*

1. Neither the district court's nor this Court's prior opinion fully answers the questions pertinent to a rule of reason examination of competitive effects. Both courts focused primarily on the alleged anticompetitive effects of the challenged conduct. Neither sought to determine whether those effects were outweighed by procompetitive results relevant to network licensing.

The district court focused its analysis of anticompetitive effects solely on the foreclosure aspects of the blanket license.[7] While the court acknowledged CBS's arguments that copyright owners who derive benefit from the ASCAP-BMI licensing system might be "disinclined" to deal with CBS in a direct licensing market, and that CBS's perception of the risk entailed in abandoning the current licensing system to attempt direct licensing had kept it locked into the blanket license, the court believed that the crucial issue was not what CBS or copyright owners "perceived" their respective risks to be, but what in fact licensors would do when faced with requests for a direct license. 400 F. Supp. at 766-767. The court found from the testimony of publishers and song writers, and from the nature of the music industry (*id.* at 770), that "copyright owners would line up at CBS's door if direct dealing were the only avenue to fame and fortune." *Id.* at 768. It concluded "the CBS has failed to prove that the 'disinclination' of writers and publishers to leave the blanket system would ripen into a refusal to deal directly." *Ibid.* Believing that as long as a feasible alternative to blanket licensing existed CBS had failed to prove an unlawful restraint, the district court did not attempt to ascertain whether the blanket license contributed to less blatant deviations from a competitive market. Finding no likelihood of an outright refusal to deal, the district court felt no need to conduct a balancing test or consider less restrictive alternatives.

This Court, on the other hand, found that a copyright owner disinclination to compete, coupled with what the

[7] This may be due to the way in which CBS framed its complaint, *i.e.*, in terms of "compulsion." 400 F. Supp. at 745.

Court viewed as the price-fixing aspects of the blanket license, warranted *per se* condemnation.[8] Although the Court found that the "infringement aspect, unknown elsewhere, except to some extent in the field of patents, makes the music industry *sui generis*" (562 F. 2d at 132), and that for some business purposes a blanket license might be desirable (*id.* at 140), the Court's price-fixing characterization and attendant *per se* analysis made unnecessary: the identification of all the potential anti-competitive effects of and countervailing justifications for blanket licensing; a balancing of the competitive effects; and a search for less restrictive alternatives.

2. We submit that the most accurate manner in which to assess the legality of ASCAP and BMI's blanket licensing practices relating to the television networks is to recognize the undisputed fact that the market reflects substantial deviations from the competitive norm. The thousands of music composers and publishers do not offer network users their works at prices subject to individual negotiation. They may compete by other means to obtain network exposure for their individual works but, unlike sellers in a fully competitive industry, they do not seek to obtain exposure by lowering their prices. This deviation from the competitive norm is particularly significant in view of the district court's findings that for many purposes numerous musical compositions are relatively fungible for network use. 400 F. Supp. at 783, also 779. In

[8] This Court stated: "[o]ur objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete." 562 F.2d at 140. It is not clear to us whether the Court viewed the disinclination effect alone—apart from what it perceived as the price-fixing aspects of the blanket license—as an unreasonable restraint of trade.

such circumstances, it would be expected that composers of lesser reputation, or greater financial need at any given moment, would attempt to obtain network plays by engaging in price competition.

Another deviation from a competitive market may be manifested by the fact that, by charging a fee based on a percentage of advertising revenues (400 F. Supp. at 743), ASCAP has been able to obtain more money from the most successful network than from its rivals, despite the fact that success of a network relative to its rivals bears no relation to the amount of ASCAP music actually used under the blanket license.[9] In view of the relative fungibility of much music for many networks uses, and the fact that the use by one network will not diminish the value of a song to the others, it is difficult to imagine how even the most successful of composers, on an individual basis, regularly could charge one network more than the others without pricing itself out of at least one third of the network market. Because of the indispensable nature of its collective repertory however, ASCAP knows that the network cannot readily take its business elsewhere, and can engage in price discrimination. Thus the price discrimination engaged in by ASCAP over the years may manifest collective market power exercised by ASCAP.[10]

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[9] The value of the music licensed by ASCAP certainly has no bearing on the relative success of the three networks since they all license the entire ASCAP and BMI repertory.

[10] Price discrimination exists when a seller or licensor charges different customers different prices for the same product or different products having the same costs of supply. *F. Scherer, Industrial Market Structure and Economic Performance*, 253 (1971); *L. Sullivan, Handbook of the Law of Antitrust*, § 29 (1978); II *P. Areeda & D. Turner, Antitrust Law* § 514a (1978). In a competitive market, price discrimination cannot occur for any length of time because other sellers will divert the high profit sales until the differential is eliminated. *Sullivan, supra*, at

In addition to the factually undisputed anticompetitive characteristics of the market which have developed while blanket licensing of the networks has taken place, there is the question whether the effect of the blanket license would make CBS's task of engaging in direct licensing more difficult or more costly. The district court's finding that copyright owners would not refuse outright to deal with CBS if CBS abandoned the blanket license (400 F. Supp. at 779) does not by itself preclude a finding that they might make the terms of direct dealing sufficiently onerous to frustrate CBS's efforts in that regard. Moreover, a finding that a feasible alternative to direct licensing exists does not preclude the possibility that ASCAP and BMI might be able to secure supracompetitive prices or impose unreasonably burdensome terms on their licenses in recognition of the economic barriers to direct dealing which the blanket license and its concomitant disinclination effect produce. In reviewing the district court's findings, this Court previously stated that "on this record," taking into account "the strong bargaining power of CBS", it was not convinced that a blanket licensing system overhanging the market would necessarily affect the price of individual licenses. 562 F.2d at 140 n.27. The Court did not address the further question, however, of whether the cost of terminating the blanket license—with

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89; *Areeda & Turner, supra*, at 342. Price discrimination can occur only when three conditions exist: (1) the seller has market power, *i.e.*, some control over price; (2) customers can be segregated into discreet classes with different reservation prices or demand elasticities; and (3) there is an inability of customers paying lower prices to resell to those charged a higher price (a condition which is inherent in a market which deals with a license or a service). *R. Bork, The Antitrust Paradox* 377 (1978); *Scherer, supra*, at 253; 256. Thus persistent price discrimination is evidence of a seller's market power. *Areeda & Turner, supra*, at 342.

its attendant risks of securing direct licenses at economically feasible terms—is sufficiently high to enable ASCAP and BMI to take this termination penalty into account in setting fees for its blanket licenses. See Justice Stevens' dissent in *Broadcast Music, Inc.* v. *CBS*, *supra*, 99 S. Ct. at 1565-1567 & n.31. Further analysis of these questions on the basis of the record evidence seems called for.[11]

In any event, we submit that the undisputed evidence of certain noncompetitive market characteristics which have developed in the network licensing business while the blanket license has been in use impose the burden on the defendants to justify its continued use. We hasten to add that the findings of anticompetitive effects do not mandate a finding of illegality under the rule of reason. Rather, they require a showing by defendants[12] that

[11] The district court found that ASCAP and BMI have neither the power to set prices nor the power to exclude competition (400 F. Supp. at 783), and that, not only did CBS fail to establish that ASCAP and BMI have the power to control price in a direct licensing market, but that defendants' power "to control the price even of their own blanket or per-program licenses is sharply curtailed under the [consent] decrees." *Id.* at 783. This discussion of defendants' "power" took place in the context of CBS's Section 2 monopoly claim, however. Since the power to cause price deviations from a competitive norm which signals concern for anticompetitive effects under Section 1 of the Sherman Act is far less substantial than the monopoly power required under Section 2, we do not know what the court's conclusions would have been if it had applied a proper Section 1 analysis to the undisputed fact of price discrimination and the evidence of leverage provided ASCAP by the costs of termination of the blanket license.

And while the district court concluded that CBS could, within a "reasonable" time, drop its blanket license by negotiating direct licenses for pre-packaged programs and securing limited per-program blanket licenses from ASCAP (400 F. Supp. at 765, 779-780), the court did not evaluate whether even minimal barriers to alternative licensing should or could be eliminated by use of a less restrictive form of blanket license.

[12] But see note 5, *supra*.

procompetitive benefits attributable to use of a blanket license for the networks outweigh the anticompetitive effects and that the blanket license is no more restrictive than necessary to achieve the countervailing benefits.

3. Identification of procompetitive benefits attributable to the use of blanket network license may be accomplished only by reviewing the evidence of record, a task which the United States, as *amicus*, has not presumed to undertake. We offer several observations relevant to the identification of procompetitive effects, however, in an effort to assist the Court.

First, the fact that a blanket license may promote competition with respect to other users of music, *e.g.* radio or TV stations, is not entitled to be weighed against anticompetitive effects in television networks licensing.[13] Thus, if television networks do not need a blanket license to obtain adequate indemnification, the fact that radio or TV stations may need such protection because of their spontaneous programming would not justify a competitive restraint on the television networks.[14] Similarly, if

[13] The district court recognized that through the use of a blanket license ASCAP and BMI are able to generate transaction cost efficiencies not available in the case of individual transactions. *Id.* 400 F. Supp. at 742. Its opinion, however, does not explore the magnitude of these efficiencies in the context of the television network market.

[14] It has not been argued that the benefits of broad indemnification, monitoring and reduced transaction costs to some users, *e.g.* radio stations, are dependent on inclusion of the television networks under a blanket license. Moreover, even if such an argument were advanced by ASCAP, it should be rejected for the antitrust laws do not allow sellers to impose competitive restraints on one distinct class of customers in order to benefit a different class of customers. Cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370-371 (1963) (violation of Section 7 of the Clayton Act in local market is not excused by procompetitive effect in larger regional and national markets). Thus, the argument advanced by *amicus* Aaron Copeland, *et al* (Br. 22-32) that freeing the network of a blanket license would

monitoring network use of music is found to be necessary to protect the copyrights of composers and publishers, the Court still must determine whether the necessary monitoring can be done without a blanket license. If it can, the procompetitive benefits of monitoring network use may *not* be attributed to the blanket license and weighed against the anticompetitive effects of such licenses. See discussion at pages 13-14, *supra*.[15]

Only after all the competitive effects, positive as well as negative, of blanket licensing to the television networks are explored, may this Court determine whether the licenses unreasonably restrain competition under a rule of reason analysis. If this Court chooses to make these additional findings itself, it should make clear which of the relevant district court findings it is adopting and which, if any, it finds to be clearly erroneous.

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amount to discriminatory subsidization beyond the province of the judiciary must be rejected. If the television networks have been deprived unreasonably of the benefits of competition by the effects of the blanket licensing system, they should not be required to continue subsidizing other ASCAP customers. The removal of such a competitive restraint, if found, hardly would constitute a usurpation of legislative functions by the judiciary, as *amicus* Aaron Copeland contends. To the contrary, it is the duty of the judiciary, charged, as it is, by Congress with enforcing the antitrust laws, to remove such competitive restraints.

[15] Finally, it should be noted that all alleged benefits resulting from joint action are not entitled to equal weight in the balance against the joint action's anticompetitive effects. Those benefits that allegedly are necessary to create a market, in this case the monitoring by sellers and broad indemnification for users, are entitled to greater weight than benefits which reflect only cost savings. To countenance a significant restraint of competition for cost savings alone would constitute an improper judicial rejection of the congressional determination that, in the long run, greater competition provides the best means of lowering cost and spurring innovation. This does not mean that if transaction savings are so significant that, without them, a competitive market could not function they should not be considered.

II. THIS COURT'S DETERMINATION OF THE LEGALITY OF THE BLANKET LICENSE AS TO THE TELEVISION NETWORK LICENSEES MUST BE MADE ON THE EVIDENTIARY RECORD DEVELOPED IN THIS CASE AND THEREFORE SHOULD NOT BE EXTENDED TO OTHER USERS

Whether or not this Court finds that the current form of blanket license is unlawful as to CBS and the television networks, we believe that the blanket license should not be enjoined in this case as to other users.

Although CBS owns radio stations as well as its television network (400 F. Supp. at 742), it brought this suit solely as a television network licensee. 400 F. Supp. at 741. The evidence focused on the purpose and effect of the current blanket licensing system as it benefited or harmed CBS as a TV network user of copyrighted music. The competitive effects of the challenged licenses may be quite different in that context than with respect to other classes of users. For example, even if much of CBS's music needs for pre-recorded programs can be planned well ahead, and undetected infringement does not pose a significant problem in television performances, the same may not be true for other music uses. The district court expressly noted that conditions prevailing in the market for performance rights to music used on CBS were very different from circumstances involved in the so-called "3M Incident" where infringement could not be detected or controlled.[16] 400 F. Supp. at 773-774. This Court, too, noted in its prior opinion, notwithstanding its finding that the blanket license was a *per se* violation of Section 1, that "[t]here is

[16] See *e.g.*, 400 F. Supp. at 780; See also 56.1 F.2d at 140 n.27.

not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." 562 F.2d at 140.

The Supreme Court similarly noted that "the necessity for and advantages of a blanket license for [radio and television network] users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public." 99 S. Ct. at 1563.[17]

This record does not purport to address the needs or interests of users other than the TV networks. Consequently, this Court should not extend any holding here to other classes of users.[18]

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[17] Conversely, licensees who do not have the "strong bargaining power" of CBS and who might wish to get out from under the blanket license, but cannot, might be able to prove an unlawful restraint where CBS could not.

[18] Indeed, a finding against plaintiff here should not be binding on the other television networks who are not parties to this suit and have had no opportunity to control this litigation or present evidence. 1B *Moore's Federal Practice* ¶0.411[1], [6]; *Divine* v. *Commissioner*, 500 F.2d 1041, 1045 (2d Cir. 1974) (citing Section 93 of ALI Restatement of Judgments); *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201, 1203-1204 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). A decision here must be predicated on the evidence adduced or not presented by CBS under the various legal theories it has advanced in this litigation.

III. A DETERMINATION THAT THE BLANKET LICENSE IN ITS CURRENT FORM IS UNLAWFUL WOULD NOT NECESSARILY PRECLUDE ASCAP FROM OFFERING LICENSES TO INDIVIDUAL COMPOSITIONS BASED ON PRICES DETERMINED INDEPENDENTLY BY COPYRIGHT OWNERS.

If this Court rules that the current television network blanket license is unlawful, we believe ASCAP and BMI could function as agents for their members and affiliates by offering licenses to individual compositions in their repertories, if users and copyright owners agree, at prices independently determined by individual copyright owners. Indeed, the consent decrees authorize such licensing in addition to the blanket license.[19] Under such an

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[19] We distinguish such a license from the "per use" system suggested by CBS in the district court as a "remedy" to the current blanket license issued by defendants. The "per use" system is a blanket license, but the fee for the license would be based on musical compositions actually played, and derived from a price schedule fixed by ASCAP or BMI and covering all compositions in their repertories. See 400 F. Supp. at 747 n.7. If the current form of blanket license is found to be unlawful, a per use system would appear to have many of the same deficiencies. An ASCAP or BMI fee schedule would automatically eliminate price competition among individual compositions in their repertories. The schedule would have a direct impact on the price of compositions in a direct licensing market as well, since the product—a single composition—is the same.

The "per-use" system which CBS proposed to replace the current system preserves to it the advantages of blanket licensing. In that "per-use" system, immediate access to ASCAP's repertory and broad infringement indemnification would still be available, but CBS would pay only for works actually performed. See 400 F. Supp. at 747 n.7. Thus, CBS appears to want the advantages of a blanket license without wanting to pay any premium for its unique benefits. See *BMI* v. *CBS*, *supra*, 99 S. Ct. at 1556-1557 n.13. If blanket indemnification does benefit users, it is not necessarily unreasonable to set the fee for such

arrangement, fees for individual compositions, like those negotiated for synchronization rights through the Harry Fox agency (see 400 F. Supp. at 759-760), must be set individually by the copyright owners and not collectively by ASCAP or BMI. Of course, if ASCAP or BMI attempted to use individual licensing as a mask for collusive pricing among copyright owners or as a means of denying access to the benefits of its joint venture to some composers while favoring others, serious antitrust questions would be raised.

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service independent of actual usage. For, while a user may not use all the music for all the programs to which it is entitled, it has the option to do so, and that option has value apart from the actual music used. See *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950); *Broadcast Music, Inc.* v. *CBS*, *supra*, 99 S. Ct. 1556 n.13.

We also question CBS's modified "per-use" proposal in the court of appeals (CBS Brief on Appeal, pages 23-24, 46-48). To the extent it asks for ASCAP or court-set rates (CBS Br. 36, 48), it is as inappropriate as the original "per-use" remedy outlined to the district court. While a court-set schedule appropriately might be considerd at the remedy stage if it is the only means of correcting the anticompetitive effects of past conduct, neither an ASCAP-devised nor a court-ordered price list would appear to facilitate competitive pricing as well as direct licensing would. These complex matters of relief, however, can be dealt with best on remand if it is determined that a violation has occurred.

CONCLUSION

For the foregoing reasons this Court must make additional findings, or remand the case to the district court for pertinent findings, before a determination as to the lawfulness of the current blanket licensing system can be made under the rule of reason analysis mandated by the Supreme Court.

Respectfully submitted.

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APPENDIX I

BRIEF OF THE UNITED STATES SUBMITTED TO THE SECOND CIRCUIT COURT OF APPEALS

UNITED STATES v. ASCAP (APPLICATION OF NATIONAL BROADCASTING COMPANY)

APPENDIX I

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 71-1487

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS,
Defendant-Appellee,

NATIONAL BROADCASTING COMPANY, INC.,
Applicant-Appellant.

Brief of Plaintiff, United States of America

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In the

United States Court of Appeals

For the Second Circuit

No. 71-1487

United States of America,

Plaintiff,

v.

American Society of Composers, Authors & Publishers,

Defendant-Appellee,

National Broadcasting Company, Inc.,

Applicant-Appellant.

Brief of Plaintiff, United States of America

This is an appeal by the National Broadcasting Company, Inc. (NBC) from an order and judgment of the District Court for the Southern District of New York (J.A. 437-438a) entered January 25, 1971, denying its application for the determination of a reasonable fee for its requested license for performing rights limited to approximately 2,200 compositions in the repertory of the American Society of Composers, Authors and Publishers (ASCAP).

Question Presented

Whether, under the 1950 Amended Consent Decree in *United States* v. *ASCAP,* Civ. Action 13-95 (S.D.N.Y.),[1]

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[1] The relevant portions of the decree are set out in the Appendix, *infra*, pp. 19a-27a [not reprinted].

ASCAP may refuse to license less than its entire repertory of non-dramatic non-exclusive performing rights for copyrighted compositions, where the effect is to deter a bulk music user from dealing directly with individual ASCAP members, thus necessarily preventing any price competition between those members.

Statement

This controversy began in the course of negotiations between ASCAP and NBC for a new five-year license for non-dramatic performing rights to copyrighted musical compositions in ASCAP's repertory. On October 14, 1969, NBC asked ASCAP to quote fees "on a blanket basis and on a per program basis" [2] (J.A. 242a). ASCAP did not immediately make any quotation, insisting that it first needed detailed information about NBC's operation (J.A. 238a). By letter dated March 10, 1970, NBC informed ASCAP that it did not believe that ASCAP was either in need of, or entitled to, the requested information (J.A. 112a). At the same time it made application for "a license for approximately 2,217 compositions and certain background music libraries" (*ibid.*). ASCAP's response, on March 17, 1970, suggested that NBC obtain licenses for the compositions it wanted directly from its members in interest and quoted a fee solely on a blanket basis (J.A. 254a). Ten days later NBC made application to the district court

[2] Both blanket and per program licenses give a licensee the right to use ASCAP's entire repertory. A blanket license simply covers the user's entire operations for the duration of the license and the fee is based upon a percentage of his revenues. A per program license covers only those programs in which ASCAP music is actually used. Its fee is based upon a percentage of revenues obtained from those programs only, but that percentage is higher than that charged under a blanket license.

for an interim fee for its designated selections, expressly withdrawing its October 14, 1969 application. On May 13, 1970, NBC formally petitioned the court to set a fee for the desired compositions under Section IX(A) of the 1950 Amended Consent Decree (J.A. 107a-110a).

Before the district court, NBC argued that ASCAP's insistence upon a blanket license is illegal "package licensing." *Reply Memorandum of National Broadcasting Company, Inc.*, May 1, 1970, pp. 2-5. It also argued that the practice unlawfully fixes the prices paid for ASCAP compositions. *Reply Memorandum on Behalf of National Broadcasting Company, Inc.*, July 10, 1970, p. 13. Moreover, it contended that Section VI obligates ASCAP to ascertain the number of compositions it can license as requested, and Section IX(A) requires the district court to determine a reasonable fee for such a license.

ASCAP maintained that the amended decree does not either expressly or impliedly require it to license less than its entire repertory. *ASCAP's Memorandum in Opposition to NBC's Application,* April 15, 1970, pp. 2-3. Sections V(A) and VII, it argued, alone determine what kind of license must be given to telecasters and those provisions require only blanket and per program licenses. *Id.* at 2.

The United States, supporting NBC's application, asserted that Section VI of the decree requires ASCAP, at NBC's request, to seek licensing authority for specified compositions.

The district court denied NBC's application. It held that Section V(A) defines the scope of a license for a television network as "the ASCAP repertory" and no less (J.A. 433a-434a). It construed Section VI as permissive, not mandatory, and not intended for the use of "bulk" users (J.A. 434a). It dismissed Section IX(A) as procedural only,

without any substantive effect (J.A. 434a). Moreover, it suggested that NBC's requested license, if directed, "might very well import substantial antitrust implications" (J.A. 436a).

Argument

I. Under the Terms of the Amended Consent Decree, ASCAP Cannot Force Bulk Music Users to Take a License for Its Entire Repertory, Where It Effectively Deters Competition Between Individual ASCAP Members.

Within the framework of this appeal, NBC's right to obtain a license for a selected portion of ASCAP's total repertory depends exclusively upon the provisions of the 1950 Amended Consent Decree. *United States* v. *ASCAP (Shenandoah)*, 331 F.2d 117, 123-124 (C.A. 2, 1964). And, construction of the decree "must be discerned within its four corners" in order to determine the bargain struck by the contending parties. *United States* v. *Armour & Co.*, 39 U.S.L. Week 4614 (O.T. 1970, No. 759, June 1, 1971). This the district court did not do. Rather it focused narrowly upon isolated provisions of the decree, without placing its provisions in their proper context. When viewed as a whole, against the background of the problem which necessitated the 1950 Amendment, it is clear that this decree prohibits ASCAP from imposing licenses for its entire repertory in interference with direct licensing between users and its members.

As this Court stated in *Shenandoah, supra* (331 F.2d at 121):

> The Amended Final Judgment (in this case) of March 14, 1950, considerably amplified an earlier con-

sent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948).

Alden-Rochelle was an action by movie exhibitors for an injunction against ASCAP's practice of separately licensing synchronization of compositions in sound tracks of motion pictures and the performing rights for those works. In effect the exhibitors wanted the performing rights included with the film rights—i.e., licensed at the source—in order to avoid the necessity of paying ASCAP for a blanket license in addition to their costs for film rights. Motion picture producers, who then participated in ASCAP revenues through their publisher subsidiaries, routinely discriminated between non-ASCAP and ASCAP works. As to non-ASCAP compositions they would insist upon both synchronization and performance rights; but, under their arrangement with ASCAP, which held the non-dramatic rights of its members' copyrighted music, they could only receive synchronization rights. Since ASCAP works were used in most films, an exhibitor had no choice but to accept an ASCAP blanket license.

The district court found both ASCAP's structure and practices in licensing motion picture theatres rife with

antitrust violations. Its key findings were that (80 F. Supp., at 894):

> The combination of the members of ASCAP in transferring all their non-dramatic performing rights to ASCAP is a combination in restraint of interstate trade and commerce, which is prohibited by § 1 of the antitrust laws. It restrains competition among the members of ASCAP in marketing the performing rights of their copyrighted works. And by barring a member from assigning the performing rights to the motion picture producer at the same time that the recording right is assigned, the channels in which the films may be marketed is narrowed to those exhibitors who have a license from ASCAP covering the performing rights of the ASCAP music synchronized on the film.

And it further held (80 F. Supp., at 895):

> Where the power to fix prices is created by an agreement among those who control a substantial part of an industry and who should do business on a competitive basis in a free market, the reasonableness of the prices or the good intentions of the combining units would not absolve them from the charge that they have violated the antitrust laws.

The basic principle that ASCAP cannot exploit pooled copyrights to stifle competition between the individual works of its members was emphasized in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), which passed on the identical practices under review in *Alden-Rochelle*. The court there found that "[f]ree competition among the members of ASCAP to license individually their

music is effectively curbed, if not completely obliterated, by the scheme of operation which the members of ASCAP have adopted." 80 F. Supp. at 847. It concluded that "[c]ompetition is effectually restrained because all licenses are granted by ASCAP under its control and domination." 80 F. Supp. at 849.

It was in light of these decisions that the 1950 Amended Decree was negotiated.[3] And the provisions designed to meet the restraints on individual licensing, which they unearthed, cannot be construed narrowly. *Alden-Rochelle* and *M. Witmark* exposed the vulnerability of ASCAP to collateral antitrust attack in any situation where its collective activities needlessly cut off individual licensing and the competition between individual works that individual bargaining necessarily engenders. See Timberg, *supra*, at 301. The provisions adopted in the Amended Decree reflect this basic understanding of the parties, and the decree broadly preserves the opportunity for licensing on an individual basis. Thus, Section IV(A) permits ASCAP to accept only non-exclusive rights, leaving its members free to license their works independently; Section VI makes possible individual licensing where the member or members of interest cannot be reached; and, Section IV(B) expressly prohibits ASCAP from "[l]imiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance . . . ."

The refusal to deal under the circumstances of this case does interfere with individual licensing with at least one of the anticompetitive effects condemned in *Alden-Rochelle*

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[3] In fact, the same provisions were substituted for the judgment in *Alden-Rochelle*. Timberg, "The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950", 19 Law & Contemporary Problems 294, 301 (1954).

and *M. Witmark*—i.e., elimination of price competition. As those decisions effectively demonstrate, the legitimate ambit of ASCAP's normal activities lies precariously close to *per se* violations of the antitrust laws. ASCAP's collective marketing activities have been tolerated largely because composers and publishers individually are unable to do the policing necessary to enforce their evanescent performing rights. Shull, "Collecting Collectively: ASCAP's Perennial Dilemma," 7 Copyright L. Symposium 35 (1956). And the principal justification for licensing ASCAP's entire repertory is that the typical user is unable to bargain individually for performing rights with widely dispersed composers and publishers and still provide the program flexibility he requires. Timberg, *supra,* at 297. To the extent that joint activity is necessary to make the market function at all, there is ample precedent for accommodation of the joint marketing arrangement under the antitrust laws. See *Associated Press* v. *United States,* 326 U.S. 1; *United States* v. *St. Louis Terminal,* 224 U.S. 383; *Appalachian Coals Inc.* v. *United States,* 288 U.S. 344; *Chicago Board of Trade* v. *United States,* 246 U.S. 231. But by the same token, where individual dealing is possible, the limited justification for collective action is removed and the joint activity must be subjected to traditional antitrust analysis.

The decree provisions protecting individual licensing draw precisely this distinction. In the words of one well-informed commentator (Timberg, *supra,* at 320):

> While the Amended Consent Judgment vindicates an ASCAP member's rights to license performing rights even while a member of ASCAP, this legal vindication may well be meaningless economically. The fundamental premise underlying ASCAP's continued existence and acceptability to users was that ASCAP's users

> needed immediate access to ASCAP's entire range of compositions, and that it was impracticable for them to negotiate with individual writers and publishers. Nevertheless, should economic circumstances ever be propitious for the exercise of this right of individual licensing, its legal basis has been firmly established in the Amended Consent Judgment.[4]

Moreover, the right to deal individually cannot be exclusively that of the copyright holders. In *Alden-Rochelle* and *M. Witmark,* ASCAP members were the primary beneficiaries of the refusal to license individual performing rights. It could hardly have been solely to protect them that those decree provisions designed to preserve individual dealing were written; rather it is clear that the parties understood that the provisions are to preserve opportunities for competition.

Whether or not circumstances are "propitious" for NBC to engage in individual licensing is in the first instance a decision NBC, not ASCAP or the district court, must make. NBC here proposes to administer its own repertory of compositions with the aid of a "nucleus license" from ASCAP, which it proposes to augment on an individual basis according to its needs. *Reply Memorandum on Behalf of National Broadcasting Company, Inc.,* July 10, 1970, pp. 11-13. There is no reason to believe that NBC lacks the staff or expertise necessary to determine its

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[4] Moreover, at least one other commentator shares Timberg's view and concludes that in the wake of the Amended Decree (Shull, *supra* at 53): "ASCAP can no longer demand that a licensee take the whole portfolio and it must license on a per piece basis whenever requested to do so." Clearly the parties to the decree contemplated licensing on this basis, as Section IX(A) expressly refers to applications for "any, some or all of the compositions in the ASCAP repertory."

music requirements and acquire a repertory to meet its needs. But its incentive to do so is obviously affected by ASCAP's willingness to cooperate in that effort. In the first place, Section VI provides the only basis available for licensing works owned by inaccessible ASCAP members. Even ASCAP probably would be unable to obtain licenses for an appreciable part of its repertory if it had to actually contact individually its widely dispersed membership to do so. And the need to obtain rights to the inaccessible segment is probably crucial for NBC's purposes. Secondly, it is obviously true that the more NBC can include in its "nucleus license" the less administrative burden it assumes and the greater the likelihood that it will undertake the effort. Thus, unless NBC has ASCAP's cooperation, it will, as a practical matter, be forced to accept a license for ASCAP's entire repertory. Quite obviously it will have no logical incentive thereafter to bargain for individual rights it already has under a blanket or per program ASCAP license. This makes a refusal to deal for less than ASCAP's entire repertory an effective interference with individual licensing in clear violation of the express terms of Section IV(A); and, the necessary effect is that the dominance of ASCAP, based upon its authority to license pooled copyrighted works, is being used to eliminate price competition between individual ASCAP compositions.

In our view this is not a "package licensing" problem, at least in the same sense as *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948) and *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), relied upon heavily by NBC before the district court. *Reply Memorandum of National Broadcasting Company, Inc.*, May 1, 1970, pp. 2-5. Those cases involved instances of group licensing of copyrighted

feature films. The licensee in each case was found to take, use, and pay for films he did not want and that were presumably of inferior quality. The tied films did not compete with each other in any sense of the word, but were simply gaining a free ride on the market power of one or more desired features.

This is not the case here. At the time a license fee is determined, it is not contemplated that the licensee will use ASCAP's entire repertory. This is evident from the fact that under Section XI of the Amended Decree, primary consideration in the distribution of fees collected by ASCAP must be given to the number of performances received by a member's works as determined by objective surveys. See generally *United States* v. *ASCAP (Zekley)*, Nos. 871-874 (C.A. 2, May 7, 1971). What happens is that a licensee pays for the right to use any number of works in ASCAP's repertory, but can freely choose among them. The works thus do compete on their intrinsic merits; and, their owners, as a basic proposition, are compensated only to the extent that their compositions are actually used.[5] But what is eliminated under a license for

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[5] What *is* arguably tied to desired compositions is the protection against copyright infringement that comes from holding the rights to use ASCAP's entire repertory. ASCAP has argued that this justifies its refusal to deal here on NBC's terms. *E.g.*, J.A. 279a-280a. But the protection thus afforded is limited, since ASCAP does not control all copyrighted music. Moreover, there is no reason to believe that the problem of chance infringements —that may occur from live broadcasts of events and performances not entirely under NBC's control—cannot be worked out separately. In any event this speculative problem cannot afford a sufficient basis for a judicially engrafted exception to the antitrust laws.

For similar reasons, arguments that group licensing is necessary as a countervailing force to NBC's superior bargaining power are not apposite here. See J.A. 273a-279a. These contentions are rooted in a philosophy of protectionism which is at odds with poli-

ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940).

We recognize, of course, that the question before this Court is what the decree requires, not the broader antitrust consequences of ASCAP's refusal to negotiate a license for less than its entire repertory. It is our posi-

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cies favoring free competition which are fostered by the antitrust laws. In the rare instances when competitive imbalance or other policy interests have been found to require protection of any group —for example, fair trade laws and the labor exemption from antitrust—this decision has been made by the legislature, not the judiciary. If ASCAP members must be insulated from price competition among themselves, that protection should be framed by Congress, not by an antitrust court interpreting and enforcing a decree intended to promote competition. And, of course, should NBC abuse its economic power in dealing for performing rights, that might well be an appropriate matter for a separate action under the antitrust laws.

NBC's proposal to create competition for ASCAP music has the potential to benefit more than NBC. The experience gained from competitive pricing should provide a basis for fee determination in instances where users are themselves unable to engage in direct bargaining for individual works.

tion that these antitrust issues were the direct concern of the parties in negotiating the 1950 Amended Consent Decree, having been squarely raised by the decisions in *Alden-Rochelle* and *M. Witmark, supra.* The resulting decree was intended to preserve opportunities for price competition by guaranteeing the right to bargain for individual licenses.

II. This Case Is Not Controlled by This Court's Decision in Shenandoah.

The instant case is distinguishable from this Court's decision in *Shenandoah, supra.* There local broadcasters attempted to force ASCAP to issue a license limited to programs they produced and originated themselves. There was no dispute over the number of compositions to be included in their requested license. Networks already held licenses under Section V that made separate licenses for local stations using network material unnecessary. The local stations wanted to compel their other sources of programing to do the same by obtaining licenses for performing rights when they paid for sound track synchronization rights. The Court found that Section V requires ASCAP only "to grant licenses that will *permit* networks and producers to clear at the source; it does not benefit local broadcasters and there is no requirement that they be offered this additional protection." 331 F.2d at 123 (emphasis in original). It concluded that Section VII alone defines the rights of local broadcasters and requires ASCAP only to issue per program licenses and to assure that such licenses represent "a genuine economic choice" *vis-a-vis* a blanket license. 331 F.2d at 122-123. It construed Section IX(A) as procedural only and Section VI as a general provision that does not override "the spe-

cific and detailed provisions relating to television stations, networks and producers." 331 F.2d at 124. The Court thus found that the precise question raised was controlled by "specific and detailed" provisions that defined ASCAP's obligations and barred, by necessary implication, the interpretation urged by the local broadcasters.

Here there are no specific provisions that exclude, by implication or otherwise, an obligation to license on a partial repertory basis. Section V, contrary to the district court's holding, does not in any way relate to partial repertory licenses. That section, as *Shenandoah* held, is concerned with the right of networks and producers to obtain licenses for their programing which include the right for simultaneous and delayed broadcasts on local stations. 331 F.2d at 123. It does not address itself at all to the number of compositions that must be licensed. And Section VII clearly is intended only to require that ASCAP issue licenses that are based upon actual use:[6] that certainly is not inconsistent with what NBC seeks here. What NBC desires is to use Section VI to obtain a "nucleus license" upon which they may build through competitive bargaining. This Court stated in *Shenandoah* that (331 F.2d at 124):

> . . . what [Section VI] says is that ASCAP must place itself in a position where, without the members' assent, it can grant the request of any applicant who wants the whole ASCAP repertory but that it may not grant a license for particular compositions without the member's request or notice to him.

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[6] Otherwise ASCAP could extend the lawful copyright monopoly by imposing charges unrelated to actual use. Compare *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 131-141 (1969).

This construction is fully consistent with the interpretation urged here: that ASCAP cannot interfere with individual licensing, which it does, in violation of Section IV (A), by refusing to use Section VI to comply with NBC's request.

Conclusion

For the foregoing reasons, the judgment below should be set aside, and the case remanded to the district court with directions that it order ASCAP to ascertain its authority to license the individual works of its members, as requested by NBC, in accordance with Section VI of the Amended Consent Decree, and to determine a reasonable fee in accordance with Section IX(A) for such compositions as ASCAP may thus become authorized to license.

Respectfully submitted,

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